S. Hrg. 101-829

NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1989

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS AND ADMINISTRATIVE PRACTICE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

ON

S. 948

A BILL TO AMEND TITLE 28, UNITED STATES CODE, TO DIVIDE THE NINTH JUDICIAL CIRCUIT OF THE UNITED STATES INTO TWO CIRCUITS, AND FOR OTHER PURPOSES

MARCH 6, 1990

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NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1989

TUESDAY, MARCH 6, 1990

U.S. Senate,
Committee on the Judiciary,
Subcommittee on Courts and Administrative Practice,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:30 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Howell Heflin (chairman of the subcommittee) presiding.

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator **Heflin**. Good afternoon. Today, the Senate Judiciary Subcommittee on Courts and Administrative Practice will conduct a hearing on S. 948, the Ninth Circuit Court of Appeals Reorganization Act. This legislation, introduced by Senator Slade Gorton, proposes to divide the ninth judicial circuits into two separate circuits.

Congress created the Federal courts of appeals and provided originally for nine circuits. In 1929, the eighth circuit was divided, creating the tenth judicial circuit. And more recently, in 1981, the court of appeals for the eleventh circuit was created by division of the old fifth circuit.

Throughout the years, there have been various proposals to split the ninth circuit. Most notably, the Hruska Commission of the mid-1970's recommended the split of the fifth and the ninth circuit. Congress, however, enacted the Omnibus Judgeship Act of 1978, section 6 of which allowed the ninth circuit to form administrative divisions and to perform its en banc functions with fewer than the total number of judges.

Today, we will examine the current status of the ninth circuit and whether the proper and efficient administration of justice warrants division. I look forward to the testimony to be presented today.

In the interest of time, I would like to remind the witnesses to summarize their prepared statements, which will be placed in the record in their entirety. Thank you.

We have statements from Senator Thurmond and Senator Grassley which we will insert into the record at this time.

[The prepared statements of Senator Thurmond and Senator Grassley and a copy of S. 948 follow:]

PREPARED STATEMENT OF SENATOR STROM THURMOND

MR. CHAIRMAN:

We are here today to conduct a hearing on S.948, a bill introduced by Senator Gorton and others, which would divide the Ninth Judicial Circuit into two separate and distinct judicial circuits. The notion of splitting the Ninth Circuit has been debated since 1973, when the Commission on Revision of the Federal Court Appellate System, chaired by Senator Roman Hruska, recommended that the Fifth and Ninth Circuit's be split.

Specifically, S.948 would create a new Ninth Circuit consisting of Arizona, California and Nevada. Additionally, a new Twelfth Circuit would be created to include Alaska, Idaho, Montana, Oregon, Washington, Hawaii, Guam and the Northern Marianas. Currently, the Ninth Judicial Circuit is the largest in the Country. The Ninth Circuit consists of: 28 appellate judges, 11 senior circuit judges, 87 district judges, 40 senior district judges, and 62 active and 8 recalled bankruptcy judges. With the size and the volume of cases filed, the Ninth Circuit Court of Appeals has had problems with respect to the median time from filing a notice of appeal to final disposition in cases adjudicated on the merits. Since 1984 the elapsed time has increased every year, and in 1988 the figure was 14.5 months compared to the national average of 10.2 months. The very latest figures indicate that the elapsed time has grown again.

Interestingly, the Ninth Circuit Judicial Conference has recommended that Congress reject any proposal to divide the Ninth Circuit. Additionally, many judges and state bar associations oppose this legislation. I hope the hearing today will illuminate all the arguments for and against this proposal.

I look forward to hearing the testimony of all the distinguished witnesses who will appear before this Subcommittee today.

Statement of Senator Charles E. Grassley
Subcommittee on Courts & Administrative Practice
on S. 948
March 6, 1990

Mr. Chairman, thank you for holding this hearing on S. 948, to divide the Ninth Circuit.

The Ninth Circuit Court of Appeals is the largest in the federal appellate system, handling more cases than any other Court of Appeals. Its enormous span encompasses nine states and one territory, stretching from the Arctic Circle to the Mexican border, and from Hawaii and Guam to Montana and Idaho. The Ninth Circuit serves a far larger population than any other court of appeals, as well: over 42 million. As one comparison, the Eighth Circuit, which includes Iowa, serves only about 17 million people.

Since the early 1970s, some have been trying to split the Ninth, but Congress delayed any action on the matter. Instead, the Ninth has been allowed to try reforms intended to enable it to perform better. Today we will hear about these reforms, and try to assess how well they have worked.

Frankly, even beyond the Ninth Circuit, the courts of appeals are facing a crisis of volume that has transformed them from the institutions they were even a generation ago. As the Federal Courts Study Committee, on which I serve, has reported, the crisis is caused partly by an increase in district court cases but mainly by more appeals. In 1945, litigants appealed about one of every forty district court terminations; they now appeal about one in eight. As a result, appellate filings have risen nearly fifteen-fold. The number of appellate judges, however, has increased since 1945 by a factor of less than three, from 59 to 168. Consequently, the caseload per judge has multiplied by nearly six over the same period.

By and large, the appellate courts have avoided the worst aspects of this growth, by increasing productivity to maximum levels and by adopting truncated procedures that probably have reached the limits of their utility without compromising the quality of the product.

More capacity -- more judges -- are urgently needed. Congress must act on a judgeship authorization bill; Congress and the Administration must work harder to fill existing vacancies. I can think of no good reason why the district and appellate court vacancies now exist in the Ninth Circuit, for example.

As I mentioned, the Federal Courts Study Committee has been looking into this area, and while taking no sides on the Ninth Circuit split, it does urge Congress, the bar and the judiciary to carefully study appellate procedure and structure. I think that's good advice, and I look forward to continuing my own study with today's hearing.

II

101st CONGRESS
1st Session

S. 948

To amend title 28, United States Code, to divide the ninth judicial circuit of the United States into two circuits, and for other purposes.

IN THE SENATE OF THE UNITED STATES

May 9 (legislative day, January 3), 1989

Mr. Gorton (for himself, Mr. Hatfield, Mr. McClure, Mr. Murkowski, Mr. Burns, Mr. Stevens, and Mr. Packwood) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 28, United States Code, to divide the ninth judicial circuit of the United States into two circuits, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Ninth Circuit Court of Appeals Reorganization Act of 1989".

Sec. 2. Section 41 of title 28, United States Code, is amended—

(1) in the text before the table, by striking out "thirteen" and inserting in lieu thereof "fourteen";

(2) in the table, by striking out the item relating to the ninth circuit and inserting in lieu thereof the following new item:

"Ninth .... Arizona, California, Nevada.";

and

(3) between the last 2 items of the table, by inserting the following new item:

"Twelfth .... Alaska, Idaho, Montana, Oregon, Washington, Hawaii, Guam, Northern Mariana Islands.".

SEC. 3. The table in section 44(a) of title 28, United States Code, is amended—

(1) by striking out the item relating to the ninth circuit and inserting in lieu thereof the following new item:

"Ninth .... 19";

and

(2) by inserting between the last 2 items at the end thereof the following new item:

"Twelfth .... 9".

SEC. 4. The table in section 48 of title 28, United States Code, is amended—

(1) by striking out the item relating to the ninth circuit and inserting in lieu thereof the following new item:

"Ninth .... San Francisco, Los Angeles.";

and

(2) by inserting between the last 2 items at the end thereof the following new item:

"Twelfth .... Portland, Seattle.".

SEC. 5. Each circuit judge in regular active service of the former ninth circuit whose official station on the day before the effective date of this Act—

(1) is in Arizona, California, or Nevada is assigned as a circuit judge of the new ninth circuit; and

(2) is in Alaska, Idaho, Montana, Oregon, Washington, Hawaii, Guam, or the Northern Mariana Islands is assigned as a circuit judge of the Twelfth circuit.

SEC. 6. Each judge who is a senior judge of the former ninth circuit on the day before the effective date of this Act may elect to be assigned to the new ninth circuit or to the twelfth circuit and shall notify the Director of the Administrative Office of the United States Courts of such election.

SEC. 7. The seniority of each judge—

(1) who is assigned under section 5 of this Act; or

(2) who elects to be assigned under section 6 of this Act;

shall run from the date of commission of such judge as a judge of the former ninth circuit.

SEC. 8. The provisions of the following paragraphs of this section apply to any case in which, on the day before the effective date of this Act, an appeal or other proceeding has been filed with the former ninth circuit:

(1) If the matter has been submitted for decision, further proceedings in respect of the matter shall be had in the same manner and with the same effect as if this Act had not been enacted.

(2) If the matter has not been submitted for decision, the appeal or proceeding, together with the original papers, printed records, and record entries duly certified, shall, by appropriate orders, be transferred to the court to which it would have gone had this Act been in full force and effect at the time such appeal was taken or other proceeding commenced, and further proceedings in respect of the case shall be had in the same manner and with the same effect as if the appeal or other proceeding had been filed in such court.

(3) A petition for rehearing or a petition for rehearing en banc in a matter decided before the effective date of this Act, or submitted before the effective date of this Act and decided on or after the effective date as provided in paragraph (1) of this section, shall

be treated in the same manner and with the same effect as though this Act had not been enacted. If a petition for rehearing en banc is granted, the matter shall be reheard by a court comprised as though this Act had not been enacted.

Sec. 9. As used in sections 5, 6, 7, and 8 of this Act, the term—

(1) "former ninth circuit" means the ninth judicial circuit of the United States as in existence on the day before the effective date of this Act;

(2) the term "new ninth circuit" means the ninth judicial circuit of the United States established by the amendment made by section 2(2) of this Act; and

(3) the term "twelfth circuit" means the twelfth judicial circuit of the United States established by the amendment made by section 2(3) of this Act.

Sec. 10. The court of appeals for the ninth circuit as constituted on the day before the effective date of this Act may take such administrative action as may be required to carry out this Act. Such court shall cease to exist for administrative purposes on July 1, 1991.

Sec. 11. This Act and the amendments made by this Act shall become effective on October 1, 1989.

Senator **Heflin**. Senator Gorton, since you introduced the bill, go ahead and make your opening statement.

STATEMENT OF HON. SLADE GORTON, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator **Gorton**. Mr. Chairman, you have already anticipated the first part of my statement. I have a written statement and, like you, I far too often listen to people read written statements which I can read much more rapidly myself. So I will simply ask that it be included in the record as a whole and speak directly to you.

Perhaps the most dramatic thing I can say, Mr. Chairman, is that I would like very much for my region of the country to be treated in the way that your region is treated, to be treated in the way, in fact, in which the other members of this subcommittee are treated.

The member of this subcommittee whose own residence is furthest from the location of his Federal circuit court of appeals is Senator Thurmond, who lives in Aiken, SC, in a circuit in which the principal courthouse is in Richmond, VA.

Richmond, VA, is considerably less than half the distance from Aiken, SC, that my home in Seattle is from San Francisco. In fact, as you look at the other cosponsors of this bill, each of them will be able to say the same thing. He and his constituents live two to three times as far from the principal courthouse of the ninth circuit as does any member of this committee.

This is simply another and more dramatic way of saying that the ninth circuit court of appeals is, by a huge margin, the largest circuit in the United States from the point of view of the number of square miles in the circuit; it is probably four or five times larger than most circuits.

It is the largest in the number of States and districts which are located in it. It is by far the largest in population, with 49 million people. It has more than twice as many judges as most circuits in the country, and it has greater regional variances than do any of the other circuit courts, all of which are logical collections of States.

Now, the net result is that, in the case of every State in the ninth circuit outside of California, including my State, which is the second most populace, almost all the decisions which affect our constituents are made by judges who live in other regions of the country.

We simply would like to have the same opportunity to divide our circuit which was granted to you, Mr. Chairman, in the last division of circuits. The division of the fifth circuit took place when both the geographical variance, the physical size, and the population variance was smaller than it is today in the ninth circuit.

Another statistic, which I think is of dramatic importance, comes from one of the efficiencies which has been created by the administration of this 28-judge court, and that is that three-judge panels are simply assigned by computer. With those 28 judges, there are over 3,276 possible combinations of judges to hear appeals in the ninth circuit.

I would warrant that no judge ever serves on an identical panel twice in his or her career.

The court has been divided now into three administrative units to decentralize certain administrative functions. They are simply paper divisions that have nothing to do with setting cases, arranging the calendar, supervising judges, or even creating the panels which hear cases.

It is significant that those three administrative divisions do divide the court into three rather distinct areas. And it is because there are some overlapping areas that, when we wrote this bill, we included in it Hawaii, the Northern Marianna Islands and Guam, largely to create a greater caseload balance.

We did that without any kind of demand that Hawaii be a part of the circuit. We believe that if the bill should pass, the Senators and Congressmen from the State of Hawaii should make the determination as to which of the two new circuits they wish to be included in.

We have heard from a number of people in Arizona, however, who state that if a division should take place, Arizona would also like a transfer away from California and into the tenth circuit.

The reason for this bill is an extremely simple one. The present circuit is too large; it is out of control. It has too large a caseload. There is too little uniformity in the decisionmaking process. Judges must spend too much time traveling. Judges are almost never on panels which allow them to meet with one another informally after they have heard oral argument and before they make decisions.

We simply would like to have a situation where justice is done reasonably close to home, and which is rendered by men and women who are appointed from geographical areas reasonably close to the litigation. We would like a situation for the Northwestern part of the United States, which is similar to every other region of the country, including California in the ninth circuit.

Will there be a difference in the substantive nature of the decisions, Mr. Chairman? I doubt it. Obviously, judges would be assigned to the new twelfth circuit from among the present judges in the ninth circuit.

I have not been able to discern a profound difference in philosophy by those who live in the Northwest and those who do not. I think the range in philosophy of the judges from the Northwest is as great as is the range of those judges who are now from the State of California.

We will have, however, the satisfaction of having our cases argued in our part of the country, before judges who are appointed from our part of the country, whose relationships with one another will be infinitely more collegial than they can possibly be at the present time. This will provide for us the kind of advantages which you, Mr. Chairman, have in your region, which New-Englanders have separate from New York, which those in the Middle Atlantic have separate from both those further south and further north—advantages which we would like the Congress to grant to us.

[Material submitted by Senator Gorton follows:]

Slade
Gorton
UNITED STATES SENATOR FOR WASHINGTON

NEWS RELEASE

Statement of Senator Slade Gorton on the Ninth Circuit Court of Appeals Reorganization Act (S. 948)

March 6, 1990

Mr. Chairman, and distinguished members of this committee: thank your for holding this hearing on The Ninth Circuit Court of Appeals Reorganization Act, S. 948. This bill would create a new Twelfth Circuit consisting of Alaska, Idaho, Montana, Oregon, Washington, Hawaii, Guam and the Northern Mariana Islands, and leave the Ninth Circuit consisting of Arizona, California and Nevada. Ultimately, Hawaii and the territories should choose the circuit in which they wish to be included. As you know, nine of the ten senators from the core of the proposed Twelfth Circuit are sponsors of S. 948: Senators Hatfield (OR), Packwood (OR), McClure (ID), Symms (ID), Stevens (AK), Murkowski (AK), Burns (MT), Baucus (MT), and myself.

What concerns me is that this circuit is too large and unwieldy. Whether measured by size, number of judges, case load, geography or population, the Ninth Circuit Court of Appeals is the nation's largest circuit. The Ninth Circuit establishment has vowed to maintain the status quo, claiming that it is deciding cases efficiently and is maintaining a consistent body of federal law. On the contrary, we have found the circuit's size has created serious problems: (1) too many judges spending too much time traveling and too little time hearing cases; (2) a growing backlog of cases so large it threatens to bury each judge; (3) a dangerous inability to keep up with current caselaw; (4) a breakdown in judicial collegiality and, most important; (5) a failure to provide uniformity, stability and predictability in the development of federal law throughout the region. In 1989, the Report of the American Bar Association Standing Committee on Judicial Improvements concluded that division of the Ninth Circuit may be justified on grounds of administration and reducing the travel of judges and attorneys. (I have filed a copy of this report with the Committee.)

Today you will probably hear some witnesses testify that this bill is about hidden, nefarious motives; court-packing; attempting to change the outcome of environmental cases; reducing the prestige and power of judges; dislike of a particular state in the circuit; or fixing a circuit that is not broken. S. 948

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is not about any of these things. This bill is about whether 40 million people in a circuit that spans nine states, two territories, and thousands of miles will receive the highest quality justice at a cost that does not deny them access.

As Members of Congress, our duty is to provide for the efficient administration of justice in every area of the country. Former Chief Judge Browning of the Ninth Circuit correctly stated in earlier hearings to dividing the Ninth Circuit, "our [C]ourt fully understands and willingly accepts the fact that it is a function of this Congress and not the [C]ourt to determine what is in the public interest in this connection."

Some judges and scholars of the Ninth Circuit refer to the Ninth Circuit as an "experiment" or "model", in which its current operation foretell the issues and problems all circuits will face in the next century. In no way can we afford to view the circuit as some great experiment. We are charged with addressing the immediate and rapidly worsening problems that such a large circuit brings to the over 40 million citizens residing within its boundaries.

How can the Ninth Circuit experiment be in the best interest of people who are served by it? People pay the high cost of a voluminous and unpredictable body of law. They wait years before their cases are heard and decided. They suffer when the law lacks continuity. People in the Northwest are concerned about the litigation explosion. Specifically, about local government's ability to handle the many criminal cases stemming from the Northwest's drug pipeline, which extends deep into Mexico. (The Attorney General of the State of Washington has submitted his testimony which discusses criminal cases in the Ninth Circuit).

When asked why the Ninth Circuit hierarchy insists on maintaining this huge circuit, some judges have mentioned pride and power. Apparently there is something less prestigious about reigning over a smaller circuit. Perhaps some Ninth Circuit judges feel less bound to the opinions of other circuits since they are in a jurisdiction deciding over 20 percent of the entire federal caseload. We found it surprising to learn that some Ninth Circuit judges even believe that the old Fifth Circuit judges made a mistake in voting to divide that circuit. Today, not one judge in the present Fifth or Eleventh Circuits expresses any regret over that split. (The Clerk of the Fifth Circuit who orchestrated the actual division has provided the Committee with his testimony.)

Our concern about the growth of the federal judiciary is shared by the 1989 Federal Courts Study Committee established by Congress. In their report of tentative recommendations one sentence states that the Ninth Circuit could be a positive model, but the rest of the report clearly details the true hazardous of a large circuit. The same problems that generally plague a large

Article III judiciary, also plague individual circuits such as the Ninth Circuit.

Their report of tentative recommendations state that a large circuit results in more conflicting opinions which, in turn, create uncertainty in the law and encourage still more litigation. As the court becomes larger and more bureaucratic, familiarity and collegiality among judges diminishes, and with it the accountability of each judge to produce an excellent work product. Also, job satisfaction diminishes as the opportunity for individual contribution diminishes. The Study Committee concluded that "increasing the size of the judiciary entails significant risks." We support these finding.

The problem of intracircuit conflict, that is lack of uniformity in decisional law within a circuit, is one of the most difficult challenges to a large circuit. As the Federal Courts committee concluded, this is a problem for which no clear solution exists. In the Ninth Circuit the opportunity for conflict is magnified since over 3,276 possible combinations of three-judge panels are possible,(not including senior or visiting judges). Judges cannot keep up with the decisions of other panels. In fact, it is my understanding that no panel knows what any other is doing.

That intracircuit conflict exists, both bench and bar of the Ninth Circuit concede. For the sake of discussion, a 1987 survey conducted by the Ninth Circuit Judicial Council revealed that 40 percent of the judges and 31 percent of the attorneys polled disagreed with the statement, "Ninth Circuit opinions generally adhere to the law announced in earlier opinions;" and 68 percent of the district judges and 59 percent of the attorneys polled disagreed with the statement, "There is consistency between panels considering the same issue." Also significant is the preponderance of unpublished dispositions which seem to hide inconsistency and compromise by the panel.

Disparity and inconsistency in opinions threaten the system in the West. Consequently, the unpredictability in circuit law breeds frivolous appeals because lawyers are led to speculate on where the law will go next. This problem is also reflected in the Ninth Circuit's survey which found that 92 percent of judges and 64 percent of attorneys felt that the court should impose stronger sanctions for bringing frivolous appeals.

Regrettably, lawyers and district judges commonly say that the "luck of the draw determines the outcome" in appellate cases in the Ninth Circuit. Lawyers are strongly inclined to appeal even the most frivolous matters, in the hope that the "luck of the draw" will provide them a panel favorable to their case. The survey found that 61 percent of the circuit's lawyers say "Once I know the judges on the panel, I know the outcome of the case." We are told, as you might expect, that such "frivolous" appeals clog the court's calendar.

The Federal Court Study Committee also expresses its fear that an increase in the ratio of case filings per judge will "inevitably" be at the expense of the quality of the court's work. The Administrative Office of the United States Court uses 255 cases per judge as its standard for determining an appropriate annual work load for each appellate judge. Each judge in the Ninth Circuit is now inundated with an average of over 467 cases per judge in 1988 (1989 figure unavailable). Many judges complain that they are overburdened. We agree with the Federal Courts Study Committee that while judges' individual productivity has increased nearly six-fold, their ability to continue to increase out put is near an end.

Simply adding a legion of new judges brings its own problems. For example, a substantial minority of judges in the Ninth Circuit, 44 percent, indicated in a poll conducted by the circuit that there is a lack of collegiality between circuit and district judges. Moreover, the inevitable increase in the number of judges continues to add to the uncertainty of the circuit's law, creating more litigation. Another "innovation" has been dividing the court into three administrative units to decentralize certain administrative functions to expedite local matters. These divisions, however, are completely cosmetic. The division heads have no duties or authority to supervise other judges, set cases, arrange the calendar, or take any action which would improve the administration of justice in respective units. If this were the situation we might have a more efficient circuit today.

As we all know, the Ninth Circuit's answer to these serious problems has been instituting bureaucratic procedures and computer-based office operations. Undeniably, technological changes are helpful, perhaps even essential; however, we have not yet surrendered to decisions by computers. Individual judges must still travel, hear and decide cases. Further, the Study Committee states that appellate judges must not have a caseload so large that they "either surrender their decision-making to staff or decide cases under such pressures so as to be incapable of thoughtful and just decision-making."

The Ninth Circuit has also experimented with the limited en banc review of appellate decisions by employing 11 judges chosen at random. Only six of the 11 can write the law of the circuit. Worse, some judges decline to vote at all on cases to be heard en banc. Many of these cases are inconsistent or out-dated and need to be overruled.

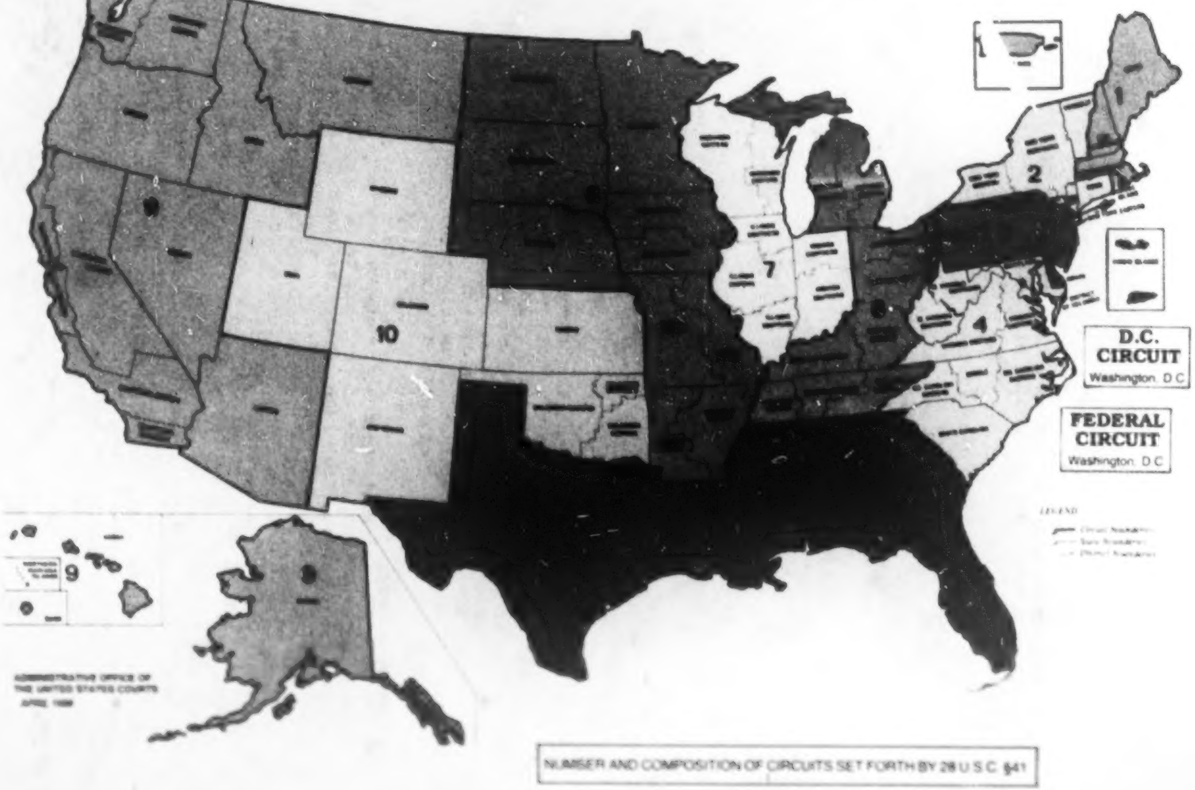
Lack of participation appears to exist for two reasons. First, some hope that the Supreme Court will hear the case if an en banc hearing is denied. Second, others find that the additional load of en banc cases is simply too much to handle. In the former, the Supreme Court is expected to decide both circuit conflict and intercircuit conflict. Indeed this is a dangerous practice which endangers the entire federal judiciary, which relies on the Supreme Court to arbitrate intercircuit conflict.

My fellow colleagues, I am of the conviction that reform of the Ninth Circuit Court of Appeals is not only necessary but imperative. I regret that the need for this proposal comes at a time following the San Francisco earthquake in which the the old Ninth Circuit headquarters was destroyed and its repair is estimated to cost over $100 million. Nevertheless, life must go on. As expected, this bill has been taken personally by the Ninth Circuit hierarchy -- God bless their souls -- who has set out to defeat this bill and protect their power base.

However, the feasibility of dividing this circuit has been studied for almost three decades, and we can no longer condone delay. My constituents and I believe the Ninth Circuit is simply incapable of meeting the challenges of the next decade, let alone the next century. The West is growing and and so is the demand on the judicial system. We must use the these precious moments of the 1990's to prepare the way for our future: a future of prompt and predictable justice for all.

On behalf of my colleagues and myself, I thank you.

Geographical Boundaries of United States Courts of Appeals and United States District Courts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LEGEND
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State Boundaries
District Boundaries
ADMINISTRATIVE OFFICE OF
THE UNITED STATES COURTS
NUMBER AND COMPOSITION OF CIRCUITS SET FORTH BY 28 U.S.C. §41

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COMMITTEES:
AGRICULTURE
ARMED SERVICES
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INDIAN AFFAIRS

POSITION PAPER OF SENATOR SLADE GORTON ON THE "NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1989" S.948

3/6/90

"There is in every body, or polity, or business a natural stage of growth, zenith, and decay." By Polybius, quoted by Erwin N. Griswold, **The Federal Courts Today and Tomorrow: A Summary and Survey** (1979).

"The familiar refrain that "if it ain't broke, don't fix it," it seems to me, does not and should not characterize federal court administration, and yet it has," in the Ninth Circuit. **William E. Davis, Director of the Administrative Office of Courts of the State of California, 1989 Federal Court Study Committee.**

"To say to the people of their circuits, "this is not constitutional, you and we must obey the law, we must change our way of living," you cannot do that with some huge bureaucracy, even if we're dressed up in black robes." Judge Larry Edmonson, **1989 Federal Court Study Committee.**

ISSUE: Whether the Ninth Appellate Circuit is too large to provide the public the highest quality justice, and therefore, should be divided into two circuits, leaving the Ninth Circuit consisting of Arizona, California, and Nevada, and creating a new Twelfth Circuit consisting of Alaska, Idaho, Montana, Oregon, Washington, Hawaii, Guam and the Northern Mariana Islands. [Hawaii and the territories should be given the opportunity to decide which circuit they choose to be included]

Executive Summary
In a nutshell: the Ninth Circuit is simply too large. This huge circuit requires too much travel, and has too many judges handing down too many opinions that breed inconsistency and lack of uniformity, and require judges and lawyers too much reading, in too little time, encouraging frivolous lawsuits and overburdening the court calendar, which costs the public too much money and delivers too slowly, too little justice.

BACKGROUND
"The Ninth Circuit Reorganization Act of 1989", S. 948, was introduced by Senator Gorton (WA) on 5/9/89. Cosponsors are Senators Hatfield (OR), Packwood (OR), McClure (ID), Symms (ID), Murkowski (AK), Stevens (AK), Burns (MT), and Baucus (MT). On 5/17/89, S. 948 was referred to the Senate Judiciary Subcommittee on Courts and Administrative Practice, chaired by Senator Heflin.

(Senator Helfin sponsored the legislation that divided the Fifth Circuit in 1981).

S. 948 represents the third time that the Ninth Circuit has faced division. Since the late 1970's, former Chief Judge Browning of the Ninth Circuit (from 1976 -1988) has fought to keep the Ninth in tact. Judge Browning, however, has not always felt the way he does today. In 1977, when the Ninth Circuit was seeking ten new judgeship positions, Senator McClellan, a member of the Hruska Commission asked if it were not true that if given the judgeships, the Ninth Circuit judges would then refuse to face up to the necessity for dividing the Circuit. Judge Browning replied, "I also reminded the Senator that I was personally in favor of dividing the circuit, having testified to that effect before the [Hruska] Commission." (Judge Browning 1977 Report to the Ninth Circuit Judges). Immediately after this statement, Judge Browning did, in fact, contradicted himself.

In light of this circuit history and the impressive lobbying efforts of bench and bar by a handful of the Ninth Circuit hierarchy, little support can be expected from the appellate judges. District judges, however, are much more divided and, in fact, there is unanimous support for S. 948 in some states. While unanimous judicial support from district and appellate judges is ideal, as Judge Browning correctly testified in the 1984 hearing on Senator Gorton's earlier proposal to divide the Ninth Circuit, "our court fully understands and willingly accepts the fact that it is a function of this Congress and not the court to determine what is in the public interest in this connection."

I. SIZE

The Ninth Circuit is the largest circuit in the country by geography, number of judges, caseload, and population of almost 40 million.

A. **Judges:** The Ninth Circuit has 28 appellate judges, 11 senior circuit judges, 87 district judges, 40 senior district judges, and 62 active and 8 recalled bankruptcy judges. Ten new district judges will be requested in 1990, and soon the Circuit must request additional appellate judges from Congress. By the Ninth Circuit's formula of judges to cases, 10 additional appellate judges are required, bringing the grand total to 38.

In 1989 Federal Courts Study Committee hearings, Judge Joseph Weis, Jr. explained that as the number of appellate judges increases, so does divergence in views. He continued that this results in more litigation for the American people, because as the law becomes less clear it's more difficult to conform to the law, and good faith disputes occur that must be resolved by litigation. Judge Weis concluded, "an increase in the number of judges I think adds to the uncertainty of the law, which adds to more litigation."

B. **Caseload:** In the year ending 3/31/89, 6,659 appeals were filed -- a 15% increase over last year -- and a backlog is rapidly forming. Increases in caseload and the length of processing of cases is also exacerbated by the new Federal Sentencing Guidelines. By 1990 the Ninth Circuit expects filings will increase to 7,500. Nationwide, the Administrative Office of the U.S. Courts estimates appeals will increase 74% nationwide by the year 2000. Also, increases in quantity are accompanied by increases in the complexity of cases, requiring longer trials. (**The United States Court of Appeals: Reexamining Structure and Process After a Century of Growth: Report of the American Bar Association Standing Committee on Federal Judicial Improvements (ABA)**, 8p.(1989)).

Appellate Judge J. Harvie Wilkinson III states, "Dean Carrington and Dean Griswold both take the court of appeals to task for what they called discretionary justice. Dean Carrington says that we have forsaken the function of error correction for discretionary justice - that there is so much law and so much doctrine out there that we can just pluck from here and there to reach the results that we want. If that is the trend, I think it is a very unhealthy one." (**Ninth Circuit Judicial Conference 1989 Reference Materials**, South Carolina Law Review 38 Vol. 437 (1987)). Clearly, this is the trend in the Ninth Circuit today.

The Ninth Circuit's response to the increasing caseload is to increase judges and staff, and establish summary procedures and computer networks, all of which continue to raise the issue of the quality and uniformity of justice on appeal. (**ABA** 6p.).

C. **Difficulty of Judges and Lawyers to Keep Abreast of the Law:** Large numbers of opinions make it near impossible for judges and lawyers to keep abreast of the circuit law. Ninth Circuit attorneys and judges have concluded that the most pressing problem of the Circuit is "the incredible caseload." The public, as well as the legal profession suffers from decisions based only on a cursory understanding of the law. (**1987 Ninth Circuit Judicial Council Survey**, 27p.).

D. **Filing Time:** It takes 15.3 months to dispose of a case from filing notice of appeal to final decision on its merits in the Ninth Circuit (6/30/89). This filing time is the longest in the nation. The Ninth has the longest median time from filing notice of appeal to the filing of the last brief in a case.

A significant minority of Ninth Circuit attorneys and judges disagree that "[t]he time from filing to disposition is reasonable," according to the survey. Also, the most prevalent survey comment from attorneys on the Ninth Circuit's procedures is that the court should shorten the processing time of appeals. (Survey, 7p.).

E. **Travel:** The large geographic area cover thousands of the Ninth increases the travel necessary to hear and try cases, reducing time for research and consideration, and increasing costs to clients. Travel expenses for Ninth Circuit judges are the highest in the federal courts.

F. **Costs:** Ninth Circuit expenses for 1988 totaled $25,319,000.00 -- about twenty-percent of the total funding for all circuit courts -- and is rising.

G. **Other problems resulting from a large circuit:**

"First, making the federal judiciary larger strains the appointments process and makes it more likely that unqualified candidates will be nominated and approved. Second, a larger judiciary results in more conflicting opinions which, in turn, creates uncertainty in the law and encourages still more litigation. Third, as [the] court becomes larger, familiarity and collegiality among judges diminishes, and with it the sense of accountability upon each judge to produce a superior work product. Fourth, since the federal bench is less financially rewarding than the private sector, job satisfaction is an important factor in attracting candidates who are challenged by an intellectually demanding position of public service. That attraction diminishes as the opportunity for individual contribution diminishes. Finally, as the court becomes larger and more bureaucratic, familiarity and collegiality among judges diminishes, and with it the sense of accountability imposed upon each judge to produce an excellent work product." **Tentative Recommendation of the 1989 Federal Courts Study Committee.**

* Conflicts regarding opinions within circuits pose the greatest problem in the largest circuits, according to the American Bar Association.

* Size of the circuit reflects reduced communications between judges which also accounts for lack of uniformity in circuit law. (ABA 9p. & Survey 27p.). Judge Weis notes "[b]ut with a smaller court, the judges on the court simply know each other better; trust each other more; are more collegial; like each other, I think, in general better; and the result of that is that work goes along smoother. As it goes along more smoothly, it generally goes along faster, and this is a good thing, I think, in terms of, again, handling our caseload." (1989 Federal Courts Study Committee).

- 59% or more of the Ninth Circuit cases handed down are unpublished. While unpublished opinions may be used to expedite case processing, they are also ground for panel compromises and inconsistent opinions. James N. Gardner says "In the United States Court of Appeals for the Ninth Circuit, for instance, the persistence of "hidden" conflict between published and unpublished opinions is hard to square with fundamental notions of equal justice." **Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?**

II. CONFLICTING OPINIONS

A. **Three-Judge-Panel Decisions Create Multiple Opportunities for Conflicting Opinions:** Three-judge panels created from the 28 judges of the Ninth Circuit increase the opportunity for conflict because of the over 3,276 combinations of panels that may decide a similar issue. (This does not include the significant number of panels composed of senior judges, district judges, and judges sitting by designation). In 1989 there were 9310 judge participations in panels. Despite computerization, panels do not know what other panels are doing. Also, the large combination of three-judge panel decisions, and the rapidly expanding caseload, make it difficult for judges to keep abreast of other Ninth Circuit decisions in order to avoid conflicting decisions. (ABA 7, 25-26p.).

It has been said that the Ninth Circuit follows a rule that a decision of a panel in a court of appeals establishes the law of the circuit and is binding on all subsequent panels of the circuit. However, Erwin Griswold without reservation, states of this rule, "It is sometimes said that this is the current practice, but any observer quickly sees that this generally is not the case. In the middle of the last decade, two different panels of the Ninth Circuit reached directly conflicting results on the same issue. A petition on en banc was denied. The issue remained unsettled until the Supreme Court ruled on the issue a few years later." Supra.

As a practical matter, frivolous appeals are frequently brought by attorneys who hope that the "luck of the draw" will provide them a favorable panel. The problem of frivolous appeals in the Ninth Circuit is reflected in the Survey's finding that 92% of judges and 64% of attorneys feel that the court should impose stronger sanctions for frivolous appeals." (ABA 8-9p.: Survey 28p.).

B. **Ninth Circuit Survey on Conflicting Decisions:** The Survey highlights the problem of inconsistency and lack of uniformity facing the Circuit:

- Ninth Circuit district judges and lawyers report that 40% of the judges and 31% of the attorneys disagree with the statement, "Ninth Circuit opinions generally adhere to law announced in earlier opinions."

- 68% of the district judges and 59% of the attorneys, disagree with the statement, "There is consistency between panels considering the same issue."

Doctrinal conflict within a circuit is known as "intracircuit inconsistency". Professor Stephen L. Wasby states, "It [intracircuit conflict] is a problem because lawyers advising their clients have difficulty deciding which precedents to follow and district court judges are unsure what rules to apply in the cases they must decide." **Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution,** Vanderbilt Law Review 1344 vol.32 (1979).

Recent examples of admitted conflicts in Ninth Circuit law include Judge Betty Fletcher's opinion in U.S. v. Salvador Sotelo-Murillo, F 2nd (9th Cir. 1989), wherein she states the following:

> *"There is an apparent split in Ninth Circuit authority over the proper standard of review of the district court's determination that a jury instruction on the defendant's theory of the case is not warranted by the evidence. [] An intra-circuit conflict may be resolved authoritatively only through en banc proceedings. In the meantime, we are faced with a situation in which we must "make an unsatisfactory choice between two opposing lines of authority, neither of which has an unimpaired claim to being the law of the circuit." **Greenhow v. Secretary of Health & Human Services,** 863 F.2d 633 (9th Cir. 1988). Supra. See also U.S. v. Brian Hoyt, F 2nd (9th Cir. 1989), "It is not necessary to resolve this conflict in this case because the result is the same under either standard."

Two other lines of cases where judges have noted conflict are **U.S. v. Shewfelt,** 455 F.2d 836 (9th Cir. 1972) and **U.S. v. Friedman,** 455 F.2d 1976 (9th Cir. 1971). **Friedman** was reviewed in **U.S. v. Zolin,** F.2d (9th Cir. 1989), in a panel including retired Chief Judge Browning, who denied en banc review though the law of the Circuit is clearly out of sinc with almost every other circuit in the country who has decided the issue. The dissent notes on this matter "the attorney-client privileges, as a rule of evidence for the federal courts, has an overriding need for national uniformity. Considering that this circuit's position clashes with that of a majority of other circuits, our order that we rehear this matter en banc was not providently granted."

C. **Role of Review by 11 Appellate Justices:** The Ninth Circuit is the only circuit that uses a limited en banc where 11 judges chosen at random review on the majority vote of 5 determine the law of the entire circuit. Although this review is intended to eliminate conflict and maintain uniformity in the law of the circuit, the American Bar Association found that limited en banc decisions are unlikely to eliminate the growing risk of conflicts within a circuit created by an increase in the number of judges. (ABA 26p.). In the Ninth Circuit, appellate judges do not frequently meet for limited en banc review, averaging nine meetings per year. Also, this procedure is both an expensive and time-consuming method of resolving conflict. (ABA 7p.).

Judge Weis noted of the Ninth Circuit's limited en banc procedure, "[t]here are some cases that have such great public significance, it seems to me, that it's really critical that an entire court sit and decide; that the imprimatur of the entire court be placed upon this decision; that the people in the circuit have the right to know that that is really the considered view of the whole court. The court also becomes, I think in general, simply less efficient." (1989 Federal Court Study Committee).

Perhaps worse than a process whereby all judges do not help decide the law of the circuit is that some judges decline to vote at all on cases to be heard en banc. Two reasons appear to exist for this lack of participation, first, some judges hope that the Supreme Court will hear the case if an en banc hearing is denied; and second, others find that the additional load of en banc cases is simply too much to handle. In the former, the Supreme Court is being misued to decide both intracircuit conflict and intercircuit conflict.

D. **Danger of Conflicts Between Circuits vs. Conflicts within a Circuit:** Conflicting interpretations of the law within a circuit may be more dangerous than conflicting legal interpretations between circuits. Conflicts between circuits are beneficial to clarify interpretations of the law. Conflicts within circuits, on the other hand, may simply go unnoticed, most especially when there are so many panel decisions. Therefore, a conflict between two circuits is readily apparent, and is beneficial to lead to a clear interpretation of the law by the Supreme Court. (ABA 26p.).

III. Geographic Representation by Three-Judge-Panels

Most districts in the circuit, (other than California), will have their cases decided by Judges from another state, because of the great number of panel combinations and high number of judges from California. Geographic representation and familiarity with regional issues is a problem. The fact that the Survey resoundingly voiced the long-held belief of almost all judges, 84%, that the appellate "Court often does not understand the practical implications of its decisions," is exacerbated by issues peculiar to the region. Also, the ABA stated if the panel of judges is not representative of the entire circuit, the peculiarities of a single district judge may be replaced by the peculiarities of a three-judge panel.

IV. **Regionalism:** The Northwest has developed its own interests that can be better addressed by judges who fully understand the unique issues of the region. A new Twelfth Circuit will also enhance continuity of the law, which suffers when judges make decisions without a full understanding of the issues of the region. Although detractors have commented that admiralty, commercial and environmental law should be uniform on the Pacific Coast, the fact is the East Coast is divided among five circuits, and no one has claimed a problem with lack of uniformity. (Also, we are fortunately going to have the same judges in the Northwest for some time to come, so there is no reason to assume such a sudden divergence in opinion when the circuit is split).

Judge Browning looks at regionalism inversely. He states that with large circuits "we can preserve the regionalism in the development of the law, which I submit to you is a vital part of our federal system." However, he does not account for the wide variance in regional concerns within the present Ninth Circuit. Judge Charles E. Wiggins has stated, "But I do know that the fact that we have eleven numerical circuits gives a circuit an opportunity to avoid conflicts, at least within a geographic area that would be more difficult to avoid if the country itself were the geographic area. The country! My goodness! The Ninth Circuit, as you know, goes literally to Japan. That's a big piece of ground and ocean. The problem of avoiding conflicts, I think, would not necessarily be reduced by one court of appeals." (1989 Federal Court Study Committee).

V. **The Role of Staff in the Judicial Process:** Procedures for deciding cases without oral argument or published opinions, and particularly the role of law clerks and staff attorneys, add to a growing concern that the court of appeals relies too heavily on bureaucratic procedures instead of the attention of individual judges to individual cases. (ABA 8p.). Judge J. Harvie Wilkinson III, states "[m]y primary goal as a judge is to cast an informed vote, because that vote is what affects the parties. One of the dangers is that the crunch of cases is going to lead judges to rely too exclusively on substitutes for briefs and records, particularly, law clerk bench memos." **Ninth Circuit Reference Materials 1989:** South Carolina Law Review 38 Vol. 437, 1987.

VI. **ABA Opinion:** The Report of the American Bar Association Standing Committee on Federal Judicial Improvements stated that division of the Ninth Circuit may be justified on grounds of administration and reducing the travel of judges and attorneys.

VII. **Cost:** The Administrative Office of the United States Courts estimates that a new Twelfth Circuit will cost approximately $1.4 million, which includes the cost of salaries, benefits, space rental, equipment, supplies and a new headquarter's library.

United States Senate
WASHINGTON, D.C. 20510

RESPONSE TO TENTATIVE RECOMMENDATIONS OF THE FEDERAL COURTS STUDY COMMITTEE

January 31, 1990

Thank you for requesting our comments on the proposed recommendations of the 1989 Federal Courts Study Committee. Since your recommendations address long-term problems facing the federal court system, it is important that they address the critical issue of circuit size. Federal circuits are rapidly expanding in both workload and number of judges, which in turn threatens the efficient and timely delivery of justice guaranteed by our Constitution.

Our concern about the size of the federal circuits, a concern shared by many of our constituents, has led us to introduce S. 948, The Ninth Circuit Reorganization Act of 1989, which proposes a division of the largest federal circuit in the United States. S. 948 would create a new Twelfth Circuit consisting of Alaska, Idaho, Montana, Oregon, Washington, Hawaii, Guam and the Northern Mariana Islands, and leave the Ninth Circuit consisting of Arizona, California and Nevada. [Our view is that Hawaii and the territories ought to be able to choose the circuit best suited to their location.]

By any measure, the United State Court of Appeals for the Ninth Circuit is the largest federal appellate court in the nation, both in terms of the number of judges, now at 28, and in caseload, with 6,621 filings in 1988 alone. If the present rate of growth in federal appeals continues, by 1995 the caseload of the circuits, particularly the Ninth, will double. Nationally, the Administrative Office of the U.S. Courts estimates that appeals will likely increase 74 percent by the year 2000.

Succinctly put, we believe that the size of the Ninth Circuit has created serious problems: too many judges spending too much time traveling and less time hearing cases, a growing backlog of cases threatening to bury each judge, a breakdown in judicial collegiality and, most importantly, a failure to provide uniformity, stability and predictability in the development of the federal law throughout the region.

We note that the Federal Courts Study Committee shares our concern about the growth of the federal judiciary. The same problems that plague a large Article III judiciary generally, also plague individual circuits, such as the Ninth Circuit. Your tentative recommendations states:

> "First, making the federal judiciary larger strains the appointments process and makes it more likely that unqualified candidates will be nominated and approved. Second, a larger judiciary results in more conflicting

opinions which, in turn, creates uncertainty in the law and encourages still more litigation. Third, as [the] court becomes larger, familiarity and collegiality among judges diminishes, and with it the sense of accountability upon each judge to produce a superior work product. Fourth, since the federal bench is less financially rewarding than the private sector, job satisfaction is an important factor in attracting candidates who are challenged by an intellectually demanding position of public service. That attraction diminishes as the opportunity for individual contribution diminishes. Finally, as the court becomes larger and more bureaucratic, familiarity and collegiality among judges diminishes, and with it the sense of accountability imposed upon each judge to produce an excellent work product."

You conclude in your proposed recommendations that "increasing the size of the judiciary entails significant risks." We concur.

Some judges and scholars of the Ninth Circuit refer to the Ninth Circuit as an "experiment", in which its current operation foretells the issues and problems all circuits will face in the near future. As Members of Congress, our role is to serve the people who reside within the jurisdiction of the Ninth Circuit. We cannot afford to be the objects of experiments wrought by the operations of this huge circuit, but must consider immediate and growing problems such a large appellate circuit brings to the over 40 million people residing within its boundaries. As former Chief Judge Browning of the Ninth Circuit correctly stated in an earlier Senate hearing to divide this circuit, "our [C]ourt fully understands and willingly accepts the fact that it is a function of this Congress and not the [C]ourt to determine what is in the public interest in this connection."

The caseload of the circuit is of increasing concern. Nearly one-sixth of the appeals nationwide are filed in the Ninth Circuit. Case filings for the Ninth Circuit in 1988 rose to 6,621, a twenty-percent increase over the previous year. The growth in caseload creates not only a backlog, but also a shift in the court's adjudicative role. As observed by Fourth Circuit Judge J. Harvie Wilkinson III, "Dean Carrington and Dean Griswold both take the court of appeals to task for what they called "discretionary justice". Dean Carrington says that we have forsaken the function of error correction for discretionary justice - that there is so much law and so much doctrine out there that we [judges] just pluck from here and there to reach a the results we want." Judge Wilkinson concludes "If that is the trend, I think it is a very unhealthy one."

This Committee reports that the caseload per federal judge is excessive. Judicial Conference estimates the appropriate annual work load per appellate judge at 255 cases. In the Ninth Circuit, however, each judge is inundated with an average of 467 cases per judge. Ten Federal Districts within the Ninth Circuit had a workload in excess of 400 cases per judge; five of those districts had caseloads in excess of 500, and one had a caseload as high as 545 cases per judge. (By the Ninth Circuit's own barometer, at least 38 judges are needed). Again, we agree with the Committee's conclusion that while the judges' individual productivity has increased nearly six-fold, their ability to continue do so is exhausted. As this Committee wisely stated:

> "We fear that further increases in the high ratio of case filings to number of judges must inevitably be at the expense of the quality of the courts' work. The Committee is concerned that, for lack of time, cases that should be heard may not, those that are heard may be decided with insufficient thought, and decisions of precedential importance could be written carelessly. We fear that workload pressures may cause non-writing judges to acquiesce too readily to the draft of the writing judges, without themselves providing constructive insight and criticism. Overtaxed to this extent, appellate courts could do serious harm not only in rendering ill-advised decisions but in producing ill-considered caselaw. These would be serious defects indeed in a justice system upon which modern society depends not only to decide controversies but also for the interpretation of its laws. This is all the more true since, while the Supreme Court is the ultimate arbiter, it

is able to hear only a diminishing percentage of the ever growing number of important appeals."

Simply adding a legion of judges to the circuit brings its own problems. Indeed as this Committee determined, a substantial majority of judges outside the Ninth Circuit, as well as some within, do not believe that bigger is better. Three quarters of the circuit judges who responded to the Committee's poll felt that 15 or fewer judges best served the proper and effective functioning of the Circuit Courts of Appeals. Even in the Ninth Circuit, a substantial minority of judges, 44%, perceived that there is a lack of collegiality between the circuit and district judges.

As one federal judge commented on this subject, as the number of appellate judges increases, so does the divergence in views. While differences in opinion on a court is not necessarily a concern, there is a point at which this divergence is reflected in the opinions handed down. As the law becomes less clear, it is more difficult to conform to the law, and good faith disputes arise that can only be resolved by litigation. Ultimately, an increase in the number of judges on the Ninth Circuit will add to the uncertainty of the law, and will only create more litigation.

Foremost of the problems created by such a large circuit is the crisis of "intracircuit conflict." The Committee's report notes correctly that maintaining intracircuit uniformity is one of the most difficult challenges of a large circuit, and one to which no clear solution now exists. In the Ninth Circuit, with over 3,276 possible combinations of three-judge panels from its 28 appellate judges, the opportunity for conflict is magnified. This staggering number of possible panels grows even higher when counting the use of senior circuit judges, district judges and judges from other circuits, (no small practice itself): these additional judges comprised 17 percent of the judicial participation in panel decisions in 1987. Clearly, with the increase in the number of possible panels comes the higher probability of conflict among panels and the near impossibility of keeping abreast of other panel decisions in order to avoid those conflicts.

It has been said that the Ninth Circuit follows the rule of _stare decisis_; that a decision of an appellate panel establishes the law of the circuit and is binding on all subsequent panels of the circuit. Erwin Griswold, without reservation, states the following caveat: "It is sometimes said that this is the current practice, but any observer quickly sees that this generally is not the case. In the middle of the last decade, two different panels of the Ninth Circuit reached directly conflicting results on the same issue. A petition on _en banc_ was denied. The issue remained unsettled until the Supreme Court ruled on the issue a few years later."

Both bench and bar of the Ninth Circuit concede that intracircuit conflict exists. A recent Ninth Circuit Judicial Council survey of district court judges and attorneys regarding inconsistency and lack of uniformity in the circuit found that 40% of judges and 31% of the attorneys polled disagreed with the statement, "Ninth Circuit opinions generally adhere to the law announced in earlier opinions"; and 68% of the district judges and 59% of the attorneys disagreed with the statement, "There is consistency between panels considering the same issue."

Illustrative of the growing problem of intracircuit conflict and its destabilizing influence on the lower federal courts is the case of _U.S. v. Salvador Sotelo-Murillo_ (1989). In _Sotelo-Murillo_, Judge Betty Fletcher, commented in frustration:

> "There is an apparent split in Ninth Circuit authority over the proper standard of review of the district court's determination that a jury instruction on the defendant's theory of the case is not warranted by the evidence. An intra-circuit conflict may be resolved authoritatively only through _en banc_ proceedings. In the meantime, we are faced with a situation in which we must "make an unsatisfactory choice between two opposing lines of authority, neither of which has an unimpaired claim to being the law of the circuit." _Greenhow v. Secretary of Health & Human Services_, 863 F. 2d 633 (9th Cir. 1988)."

One serious consequence of intracircuit conflict in the Ninth Circuit which directly involves the bar is the filing of lawsuits prompted by inconsistent appellate opinions. One Ninth Circuit scholar found, "It [intracircuit conflict] is a problem because lawyers advising their clients have difficulty deciding which precedents to follow and district court judges are unsure what rules to apply in the cases they must decide."

We are told by bench and bar alike that such "frivolous" appeals clog the court's calendar. And the urgency of this problem is reflected in the Ninth Circuit's survey which found that 92% of the judges and 64% of the attorneys felt that the court should impose stronger sanctions for bringing frivolous appeals. Frivolous appeals are often filed because lawyers are led to speculate on where the law will go next. It is commonly known that the "luck of the draw determines the outcome" in appellate cases in the Ninth Circuit. Lawyers are strongly inclined to appeal even the most frivolous matters, in the hope that the "luck of the draw" will provide them a panel favorable to their case. The Ninth Circuit's survey found that 61% of its lawyers believe that "Once I know the judges on the panel, I know the outcome of the case." This practice causes harm to the profession and, unfortunately, the judiciary has been unable to stop such frivolous appeals.

Another consequence of the size and caseload of the Ninth Circuit is delay. It is not surprising that speedy justice is not an attribute of this huge circuit. The 1988 median disposition time from filing notice of appeal to final disposition was 14.7 months, an increase from 1987 that is well over the national average. Also, the circuit has the longest median time from filing notice of appeal to the filing of the last brief: 6.3 months versus the 4.7 month national median. Sponsors of the Ninth Circuit legislation can only conclude that in our states, justice is delivered too slowly.

As we all know, the Ninth Circuit's answer to these serious problems has been instituting bureaucratic procedures and computer-based office operations. This Committee, however, concluded:

> "It has been the hallmark of our judiciary that the judges do much of their own work. While modern methods have properly added more staff assistance to the process, the judge should remain the central decision maker. We must not give appellate judges a caseload too large that they either surrender their decision-making to staff or also decide cases under such pressures so as to be incapable of thoughtful and just decision-making."

The Ninth's use of the limited en banc review has done little to rectify the situation. The limited en banc procedure exacerbates intracircuit conflict precisely because less than the full court is involved. The Court's use of the limited en banc hearing, consisting of the Chief Judge and ten other active circuit judges chosen by lot, necessarily weakens the precedential impact of decisions rendered in the name of the full court. Senior Judge Eugene Wright of the Ninth Circuit Court of Appeals lamented, "It is obvious that the 11-judge en banc court can and does decide cases on the vote of a majority, six judges. The "luck of the draw" then allows those six to speak for the majority of the 28 active judges."

Since all of the appellate judges do not participate, it is likely, as one scholar reasons, that:

> "Judges who have not participated in rendering the decision being reviewed naturally feel less allegiance to uphold that interpretation, while in a traditional en banc setting, the judges who had promulgated a dispute view of the law would be present to defend it. Thus in the case of the Ninth Circuit each decision reached by a limited en banc court has less impact upon subsequent similar cases."

To those who would like to again delay the decision whether to divide the Ninth Circuit, perhaps until after a decision is made on restructuring the entire federal circuit, we would answer that that approach is in derogation of our duty to promote the welfare of our constituency within the boundaries of the Ninth

Circuit. We can longer look the other way while this Ninth Circuit experiment continues.

There is a growing awareness in Congress that the problems that plague the Ninth Circuit cannot be addressed by simply adding more judges. Whether the decision to divide the Circuit is made now or in the future, the problems with its current operation are serious. We believe that dividing the Ninth Circuit will promote greater uniformity and consistency in the development of federal caselaw, improve the administration and efficiency of the court and ultimately strengthen the constitutional guaranty of justice to which we are all entitled.

Senator Slade Gorton

Senator Mark O. Hatfield

Senator Ted Stevens

FEDERAL COURTS STUDY COMMITTEE

Tentative Recommendations For Public Comment

December 22, 1989

The following is a list of tentative recommendations developed by the Federal Courts Study Committee. The Committee was created by Congress to examine problems facing the courts of the United States and to develop the first-ever long range plan for the Federal Judiciary.

This draft is being provided to a broad cross-section of the national community to encourage comments from diverse viewpoints before final proposals are presented in April 1990 to the Chief Justice, the President, the Congress, the Conference of State Chief Justices and the State Justice Institute.

Public hearings on the tentative recommendations are scheduled in the cities listed below. We encourage anyone who wishes to address a hearing in person to contact the Committee office as soon as possible.

Des Moines, Iowa	January 18, 1990
Madison, Wisconsin	January 19, 1990
Dallas, Texas	January 22, 1990
Miami, Florida	January 23, 1990
Salt Lake City, Utah	January 25, 1990
Seattle, Washington	January 26, 1990
San Diego, California	January 29, 1990
New York, New York	January 30, 1990
Washington, D.C.	January 31, 1990

The purpose of these tentative recommendations is to stimulate debate and comment before final resolution of Committee recommendations. Thus, this tentative listing does not reflect unanimity of opinion among Committee members on each and every recommendation.

Tentative Recommendations For Public Comment

THE FEDERAL COURTS STUDY COMMITTEE

December 22, 1989

Comments should be directed
by January 31, 1990 to:

Federal Courts Study Committee
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INTRODUCTION

Creation of the Committee

The fifteen members of the Federal Courts Study Committee ("Committee") were appointed by Chief Justice William H. Rehnquist to be "representative of the various interests, needs and concerns which may be affected by the jurisdiction of the Federal Courts" as required by Section 103(b) of the Federal Courts Study Act.[1] The participants include members of the Executive, Legislative and Judicial branches, as well as representatives from state governments, academia and private practice.

Before the appointment of the Committee, the need for a sweeping look at the system had been evident for some time. For example, the courts' caseload has been increasing dramatically since the mid-1960s and changing in complexity as well. The Committee's existence reflects the realization that Congress and the courts sense a compelling need for a comprehensive survey of the problems and of a long range plan for the federal judiciary.

The Committee is not the first group commissioned to study the problems confronting the federal judicial system but none has ever been given so broad a mandate. Other groups were instructed to study the Supreme Court's workload or the functions of the appellate courts in particular.[2] This Committee's agenda, however, embraces all phases of the federal court system, its role, its workload, its structure and its relationship with the state courts.[3] Among the many issues studied by the Committee and reported as tentative proposals in the following pages are the structure and administration of the federal court system, alternative methods of dispute resolution, proposed methods of resolving intracircuit and intercircuit conflicts in the courts of appeals, as well as a survey of the types of disputes that should be resolved by the federal courts.

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[1] Title 1 of The Judicial Improvements and Access to Justice Act (P.L. 100-702).

[2] See, e.g., Commission on Revision of the Federal Court Appellate System, Structure & Internal Procedure: Recommendation for Change, June 1975 ("The Hruska Commission").

[3] The blueprint for this Committee was drawn in Working Paper - Future of the Judiciary, 94 F.R.D. 225 (1981), by Judge J. Clifford Wallace who recommended that a Legislative Commission be constituted to conduct an in-depth study. He recommended that the Commission be established for three to five years, following which its work would be reported.

Organization and Structure of the Committee

In order to accomplish the work of examining the many issues before it, the full Committee subdivided itself into three working subcommittees, each taking upon itself a broad topical heading.

The Subcommittee on the Administration, Management and Structure of the Federal Courts looked at the administration and management of the federal system: the way cases flow between the several tiers, the organization of the courts of appeals, review of administrative actions, and major personnel issues, such as the use of magistrates, court staff and judicial vacancies. The Subcommittee on the Role and Relationships of the Federal Courts focused on the federal courts' relationship with Congress, administrative agencies and the state courts, as well as the role of Article I courts.

The Subcommittee on the Workload of the Federal Courts reviewed such matters as civil and criminal caseload problems, alternative dispute resolution, complex multi-district litigation, and science and technology in the courts.

Naturally, an unavoidable overlap of subject matter on a number of issues arose among the subcommittees, a factor which, we think, contributed to an exchange of ideas.

Each subcommittee was supported by reporters and advisory panel members. The reporters came from academia, private practice and government service. To enhance the Committee's deliberations, advisors were appointed from a broad range of experts. The advisors assisted with the research and provided responses to the Subcommittee's draft recommendations. In addition, associate reporters were appointed where their expertise on specific issues were thought to be beneficial to the Committee.

A professional staff directed the work of the Committee from the U.S. Courthouse in Philadelphia, Pennsylvania.

Process and Public Access

From its inception, the Committee has sought advice from a broad spectrum of individuals and groups. In the first seven months of its existence, the Committee concentrated its efforts on identifying the problems facing the federal courts. The Committee relied heavily on the observations and suggestions of those who labor daily in the federal court system, as well as on those who are the beneficiaries of its work.

One of the Committee's first acts was to question all members of the federal judiciary, senior court personnel, the leadership of the Administrative Office of the United States Courts and the Federal Judicial Center about the major problems facing the federal courts. Others contacted included citizen groups, bar associations, research organizations, academics, civil rights groups, labor unions, corporations, law school deans and judicial improvement organizations.

Public comment was sought through the use of press releases, articles and the electronic media. Hundreds of written comments submitted by groups and individuals were considered by the Committee.

During public hearings in Atlanta, Boston, Chicago and Pasadena, in the third month of the Committee's existence, testimony was received from seventy-eight diverse witnesses. In some instances, cable television coverage precipitated additional inquiries and comments.

In August, The Chairman's Progress Report was publicly distributed. The Report listed issues to be considered and the process to be employed.

In the remaining months, the Committee considered a variety of issues in preparing recommendations for action, or where appropriate, suggesting further inquiry.

To the extent that the Committee's recommendations result in a transference of work to state courts, such proposals arose not out of a belief that the state courts are in any way inferior or are less important than are the federal courts. Indeed, we reject that proposition. Rather the recommendations reflect the Committee's conclusion that the federal courts are limited in number, finite in scope, and imbued with a narrow mission.

The following compendium of tentative recommendations is being circulated to over 5,000 interested parties followed by a second round of public hearings in nine cities[4] in January, 1990.

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4. Dallas; Des Moines; Madison; Miami; New York; Salt Lake City; Seattle; San Diego; and Washington, D.C.

Although the statutory life of the Committee ends sixty days after transmission of its final Report, some commentators have advised the Committee to plan a follow-up effort.

The tentative recommendations of the Committee follow.

More detailed analysis for each tentative recommendation prepared by or for the subcommittees are available upon request of:

Federal Courts Study Committee
22716 United States Courthouse
Independence Mall West
601 Market Street
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The purpose of these tentative recommendations is to stimulate debate and comment before final resolution of Committee recommendations. Thus, this tentative listing does not reflect unanimity of opinion among Committee members on each and every recommendation.

I. GROWTH OF THE FEDERAL COURTS

- **Although Congress may find it necessary to add judgeships to meet immediate needs,[5] and may continue to find such additions periodically necessary, the Committee sees disadvantages in making the Article III judiciary too large. Accordingly, the Committee recommends that Congress and the Judicial Conference consider alternative means of coping with the federal caseload problem for purposes of long-term planning before routinely adding new judgeships.**

In the past, Congress has responded to caseload growth by authorizing additional judgeships. But indefinitely increasing the size of the federal judiciary poses several problems. First, making the federal judiciary larger strains the appointments process and makes it more likely that unqualified candidates will be nominated and approved. Second, a larger judiciary results in more conflicting opinions which, in turn, create uncertainty in the law and encourage still more litigation. Third, as court becomes larger, familiarity and collegiality among judges diminishes, and with it the sense of accountability upon each judge to produce a superior work product. Fourth, since the federal bench is less financially rewarding than the private sector, job satisfaction is an important factor in attracting candidates who are challenged by an intellectually demanding position of public service. That attraction diminishes as the opportunity for individual contribution diminishes.[6] Finally, as the court becomes larger and more bureaucratic, familiarity and collegiality among judges diminishes, and with it the sense of accountability imposed upon each judge to produce an excellent work product.

These problems are not so serious so as to foreclose the option of adding judges when necessary to meet urgent needs. But increasing the size of the judiciary does entail significant risks. Prudence suggests that, at least in terms of long-term planning, Congress and the Judicial Conference consider alternative solutions to appointments, such as shifting some types of cases to other tribunals, trimming back jurisdiction in areas where a federal forum is unnecessary or inappropriate, and altering the procedures for handling certain cases.

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[5] For example, we note a dire need for judicial appointments on the appellate level. Equally serious needs also exist in certain district and bankruptcy courts.

[6] A related problem is the difficulty in maintaining intracircuit uniformity in large circuits, and intercircuit uniformity if the circuits are divided into smaller ones.

II. The Reallocation of Judicial Business

A. FEDERAL AND STATE COURTS

1. Diversity Jurisdiction

- **Diversity jurisdiction should be reformed to apply only to complex multi-state litigation, interpleader, and suits to which aliens are parties. Suits based solely on diversity of citizenship would not be a basis for federal jurisdiction. As an alternative, suits brought by in-state plaintiffs would not fall within diversity jurisdiction; claims for pain and suffering, punitive damages or attorney's fees would not be included in calculating the amount in controversy; and corporations would be considered citizens of every state in which they are licensed to do business.**

Diversity jurisdiction in the federal courts has been a subject of controversy since 1788. In an effort to limit the number of these cases, a requirement of satisfying a minimum amount in controversy has been imposed. The Judiciary Act of 1789 began this tradition by specifying that the amount must exceed $500. The present jurisdictional floor is $50,000.

Despite these limitations, the flood of diversity cases into the federal system has continued and, at present, accounts for approximately 25% of the civil case load. The costs of maintaining this aspect of jurisdiction are high. A recent study by the Federal Judicial Center estimates that the judicial resources to adjudicate diversity cases are equivalent to the workload of 193 district judges and 22 courts of appeals judges. Monetary costs are estimated to be $131 million annually.[7]

Since these cases do not implicate federal law or national policy, but rather questions of state law, the strains that they place on finite judicial resources require a searching look at the scheme of diversity jurisdiction.

Diversity cases account for a disproportionate number of trials in the district courts and thus the volume of filings understates the impact of this type of litigation on the courts' workload. Moreover, the diversity cases frequently generate complex procedural and jurisdictional problems, making it more time consuming and expensive to process than similar claims in the state courts.

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[7] Partridge, The Budgetary Impact of Possible Changes in Diversity Jurisdiction (Federal Judicial Center 1988).

Because federal rulings on issues of state law do not have precedential effect, diversity absorbs judicial efforts on cases that make little contribution to a body of law. Lack of consistency between federal interpretations of state law and subsequent pronouncements by a state's highest court lead to contrary results in similar cases.

Two of the reasons alleged to justify the costs of diversity jurisdiction -- local bias and a superior bench in the federal courts -- on examination fail to meet that burden. There are scant empirical data on the bias issue, and it seems likely that other forms of prejudice are more prevalent today and more likely to influence litigation.

To the extent that there is any validity to the contention that the federal forum is superior to that of the state in some areas, the argument is self-defeating. In essence, it suggests that efforts which could be made to improve the state system are not forthcoming because of the existence of an alternative in the federal courts.

The monetary floor is an explicit recognition that the simple fact of diversity of citizenship standing alone is not an adequate justification for the use of federal court resources. The amount in controversy is an arbitrary, pragmatic attempt to limit the diversion of federal courts from their primary role of litigating federal constitutional and statutory issues. That method, however, takes no cognizance of the unique aspects of federal judicial power which should more properly be the criteria for determining the most effective invocation of diversity jurisdiction.

The Committee proposes that diversity jurisdiction be made available in complex cases involving scattered events or parties and substantial claims by numerous plaintiffs. In cases of this nature, the national reach of federal court jurisdiction would enable a single forum to resolve disputes involving multiple parties from many states. Mass disaster litigation, such as a commercial airline crash, is an obvious example. Suits in which aliens are parties and interpleader also have special characteristics which require their continuation in federal courts.

No such unique considerations, however, exist in the average contract or tort case which is governed by state law and may readily be litigated in state court. The fortuity that one party to a contract dispute or tort action may reside in another state -- in some instances, no more than a few hundred yards away -- is not an adequate justification for filing in, or removal to, a federal court when similarly situated litigants who lack diversity of citizenship must bring their suits in state courts. The Committee, therefore, recommends that diversity jurisdiction not be provided when the only basis is that the parties are citizens of different states.

If Congress is unwilling to take that action, we recommend, as an alternative, the less effective steps of (1) prohibiting in-state plaintiffs from invoking diversity jurisdiction, (2) considering corporations to be citizens of every state in which they are licensed to do business, and (3) specifying that the jurisdictional floor does not include pain and suffering, punitive damages, mental anguish, attorneys' fees, etc.

As a separate alternative, but also one that could be included within the second series of alternatives, the committee recommends that the jurisdictional amount in controversy necessary to file a diversity case in federal court be raised from $50,000 to $75,000, with indexing applied to the new floor amount.

Although diversity cases are, by definition, state law claims and thus properly matters for the state courts, the Committee has not overlooked the fact that state courts in general are also faced with increasing caseloads. Nevertheless, a study commissioned by the National Center for State Courts concludes that, on average, the increase in the number of cases filed per state court general jurisdiction judge would be approximately eleven if diversity jurisdiction were totally abolished.[8]

In this connection, the Committee notes that Congress established the State Justice Institute and appropriated funds for it. Thus there is already in existence a mechanism through which an examination of this subject could be made. If diversity jurisdiction is eliminated, in whole or in part, sufficient funds should be provided by the Congress to the state judiciaries for a reasonable period of time, to permit the state judicial systems to adjust to the increased workload and absorb the diversity cases which had been handled by the federal systems.

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[8] Flango and Boersema, How Would Proposed Changes in Jurisdiction Affect State Courts, National Center for State Courts (1989).

Several committee members are of the view that changes should not be recommended with regard to diversity jurisdiction. Those members point out that congress originally created diversity jurisdiction two hundred (200) years ago to avoid possible discrimination against out-of-state parties by providing a forum free of political influences and entanglements. They believe that a number of recent well-publicized cases unquestionably demonstrate and affirm that diversity jurisdiction is still necessary to guard against this very problem. Whatever the costs of maintaining diversity jurisdiction - and they believe those costs are overstated by the Committee - those costs are not nearly significant enough to justify the abolition of diversity jurisdiction. Accordingly they believe that diversity jurisdiction should not be abolished. Moreover, they believe that the proposed "alternative proposal which would make corporations citizens of every state in which they are licensed to do business, is not a limited alternative at all but would abolish diversity jurisdiction for most corporations, and is thus equally objectionable.

2. Complex Litigation

- **Congress should (a) amend 28 U.S.C. § 1407(a) to permit consolidated trial as well as pretrial proceedings, and (b) create a special Federal jurisdiction, based on the minimal diversity authority conferred by Article III, to make possible the consolidation of major related, multi-party, multiforum litigation.**

The past few decades have witnessed a considerable increase in complex litigation involving related claims being pressed concurrently in several federal and state courts. Airplane crash and product liability cases are only two examples. To the extent that such cases can invoke existing federal jurisdiction, current law only partly handles problems of multiplicity: 28 U.S.C. § 1407(a) permits consolidated pretrial proceedings in cases involving common questions of fact.[9] The authorized consolidation is only for pretrial matters (although as a practical matter the cases are often settled or liability questions tried together by consent); and under the statutory requirement of complete diversity, in state law matters many parties cannot take advantage of federal court consolidation because they are citizens of the same state as one of their adversaries.

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[9] 28 U.S.C. §1407(a) provides: "When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. . . ." (emphasis supplied). Section 1407(g), (continued...)

Therefore, to make fuller consolidation available when it would be desirable, Congress should both broaden § 1407(a) to allow for consolidated trial as well as pretrial proceedings and adopt a new jurisdiction based on minimal, rather than complete, diversity so that parties to a multi-state, multi-party litigation can be included even if they are citizens of the same state. To a considerable extent this jurisdiction would permit more efficient handling of cases that are already partly before the federal courts, so that caseload increases should not be severe. Federal courts could also be given discretion to remand that portion of complex cases that are predominantly in state courts.

Legislating complex litigation raises numerous difficult subsidiary issues, such as choice of law, statutes of limitations, single event or related-matter jurisdiction, removal, possible revision of joinder and class action rules, and remand for trial on damages. Partly because major studies of these questions are currently being conducted by both the American Law Institute and the American Bar Association Commission on Mass Torts, and also because many of the issues are unusually intricate and technical, the Committee confines itself to endorsement of the two principles stated above.[10]

- Guidelines on consolidation and severance should be developed for inclusion in the Manual for Complex Litigation.

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9. (...continued)
amended Sept. 30, 1976, already allows consolidation and transfer "for both pretrial purposes and for trial" of any action brought under Section K of the Clayton Act.

[10] See generally American Law Institute, Study of Complex Litigation (Tent. Draft No. 1, 1989); American Bar Association Commission on Mass Torts, Report and Recommendations (1989); Rowe & Sibley, Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction, 135 U. Pa. L. Rev. 7 (1986).

Consolidation of separate cases and severance of common issues for combined disposition should be employed to expedite disposition of cases if it can be done effectively efficiently and fairly. Occasions to combine separate lawsuits are likely to continue increasing. Our preceding recommendation, for example, proposes authorization of transfer for trial as well as pretrial proceedings and supports creation of a new federal jurisdiction as part of diversity jurisdiction reform for multiparty, multiforum litigation. The implementation of such authority usually involves consolidation of cases for handling of common issues, often followed by severance of issues for individual trial treatment. Such consolidation and severance mechanisms will become increasingly important and are to be encouraged when they can be used effectively and fairly.

Unfortunately, consolidation is not always desirable, and there are grounds for uneasiness with routine consolidation of cases and separation of issues for trial. Combination may not always be economical, for example, and trial on liability issues alone may skew results. Thus, while it is important to maker consolidation possible for cases in which it is desirable, guidelines to aid its use could reduce its misapplication when combination might be inappropriate.

At present, case law and commentary provide few guidelines for the judiciary. The American Law Institute Study of Complex Litigation has suggested criteria bearing on the problem, such as the size and subject matter of the dispute, geographic dispersion of actions, the nature and significance of local concerns, the stage of the litigation, and the relative importance of common issues.[11] This Committee is not the body to devise specific guidelines, but it recommends that they be included in further revisions of the Manual for Complex Litigation or perhaps eventually in the Federal Rules of Civil Procedure.

- **Congress and the Federal Judicial Center should develop special procedures that would avoid undue relitigation of pertinent issues and otherwise facilitate prompt and economical disposition of individual claims, for the small number of instances in which extraordinarily high numbers of injuries are caused by a single**

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[11] American Law Institute, Study of Complex Litigation 3.01 (Tent. Draft No. 1, 1989); see also id. 3.06.

product or event (such as litigation involving asbestos, the Dalkon Shield and Agent Orange).

Occasionally, products or events of massive impact may give rise to tens or hundreds of thousands of claims, sometimes concentrated in certain areas of the country. A recent example is litigation concerning injuries traced to asbestos. Such "mega-cases" can swamp several federal districts and/or state court systems with the task of relitigating similar issues and resolving individual issues. In some instances courts have concluded that it would be impossible to handle such cases in the traditional manner.

Courts confronted with such problems have therefore improvised in an effort to reduce relitigation. Asbestos caseloads have been managed through mass trials or certification of all pending cases in the district as a class action. See, Jenkins v. Raymark Indus. Inc., 782 F.2d 468 (5th Cir. 1986); Wilson v. Johns-Manville Sales Corp., 107 F.R.D. 259 (S.D. Tex. 1985), aff'd on other grounds, 810 F.2d 1358 (5th Cir.), cert. denied, 108 S. Ct. 97 (1987). In Agent Orange, a class action led to a class-wide settlement achieved with heavy judicial involvement. Congress itself designed a scheme for black lung victims to cope with similar problems.

The experience to date does not indicate that there is any single answer to such problems, but the pressures of such mega-cases warrant consideration of alternatives to the traditional approach. There are, however, substantial questions about the desirability of such alternatives. For example, the black lung scheme led to heavy judicial burdens. Other experiments with administrative alternatives to judicial resolution have experienced problems, and both the Asbestos Claims Facility and the Center for Claims Resolution (established by prospective defendants and their insurers, after negotiations with plaintiff lawyers) have not enjoyed great success. Thus it is not proposed that such alternatives be considered for situations that do not present the great problems of the mega-cases.

Neither does it seem likely at present that a single approach could be developed in advance to deal with such situations because the pertinent characteristics of mega-cases are likely to differ. Instead, once such an outburst of litigation has occurred, courts before which such cases are pending should consider alternatives to traditional methods such as claims processing mechanisms once liability has been established by traditional litigation, or providing the option of simplified administrative processing with surer, though possibly lesser, compensation. Substantial traditional litigation would probably be necessary to bring out the contours of the problem and establish fair ground rules for alternative procedures. The Federal Judicial Center should therefore collect and analyze data on the new methods and, when justified, disseminate information on the new methods to other judges before whom such litigation is also pending. Once some experience is gained with such alternatives, it may be that studies will suggest wider applications for them. When appropriate, Congress should consider legislation to facilitate the resolution of mega-cases by altering the substantive terms for relief or establishing an alternative remedy scheme.[12]

3. Criminal Jurisdiction

The rapid expansion of the federal criminal caseload due to drug prosecutions threatens to overwhelm the resources of the federal courts. The Committee believes the situation is urgent and asks for rapid congressional action on two related proposals:

- Congress must appropriate resources to enable the federal courts to deal vigorously and effectively with their enlarged criminal caseload. Congress should provide both (1) the resources requested in the Judicial Conference report of March, 1989, and (2) additional judgeships.
- The Committee recognizes the magnitude of the drug problem and that the federal courts must play a major and growing role in the campaign against drugs. However, the Committee also recognizes that exclusive or dominant reliance upon federal (as opposed to state) prosecution of drug law violations will overwhelm the resources of the federal courts and make it impossible for the federal courts to carry out their other constitutional and statutory responsibilities. Absent prompt action to forge federal-state partnerships in the drug enforcement effort, the projected tidal wave of

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[12] D. Hensler, et al., Asbestos in the Courts: The Challenge of Mass Toxic Torts 117-24 (1985); D. Hensler, et al., Trends in Tort Litigation: The Story Behind the Statistics 33-34 (1987); P. Schuck, Agent Orange on Trial 277-86 (1986); Marcus, Apocalypse Now?, 85 Mich. L. Rev. 1267, 1281-84 (1987).

drug-related cases will alter and reshape the federal judicial system.

An effective drug enforcement strategy requires a partnership between the federal government and the states, with each partner playing a distinctive role. The campaign against drugs must be fought not only in the federal courts, but also in the state judicial systems. Given the small size of the federal judiciary, federal drug prosecutions must be limited to cases that cannot be effectively prosecuted by the states.

- To the extent that Congress can provide additional federal funds for drug enforcement, those funds should be used primarily to provide federal assistance for drug enforcement at the critical state and local level, including resources for local assigned counsel, and not to fund further federal prosecutions.[13]

The federal courts are at a crucial turning point in the drug war. The criminal caseload has expanded dramatically in the 1980s, and this trend continues to accelerate. Criminal case filings have risen by 56% during this period; drug filings have increased by 229%. Drug cases now account for 44% of the criminal trials and roughly 50% of the criminal appeals. In light of the anti-drug legislation passed in 1988, the Judicial Conference estimates that by 1991 drug filings will increase by 20-50% over 1988 levels. The impact of the increased number of drug prosecutions is especially significant because drug cases tend to consume more resources than non-drug cases.

Absent congressional action, the increased criminal caseload will soon overwhelm the resources of the federal courts. A rapid diversion of resources from civil to criminal cases is occurring. Because of the speedy trial laws, criminal cases must take priority over civil cases. Some districts with heavy drug caseloads already are near the point where they no longer try any civil cases. Unless the growth of the criminal caseload is restricted, Congress will be forced either to substantially enlarge the federal courts or to drastically restrict federal civil jurisdiction to offset the increase in the criminal caseload. The Committee believes the situation is urgent.

The Committee believes Congress should respond to this crisis with a two-part strategy:

(1) Congress should increase appropriations for the federal courts to permit them to respond vigorously and effectively to their enlarged criminal caseload. Congress should provide not only the resources requested in the March 1989 report of the Judicial Conference[14] but also additional judgeships.[15] We believe the situation is far too urgent to wait for the 1990 biennial judicial survey.

(2) Congress must recognize that no matter how rapidly the capacity of the federal system -- courts, prosecutors, public defenders, and prisons -- increases, the war against drugs cannot and will not be won or lost solely in the relatively small federal system. No matter what happens in the federal courts, the war against drugs must be fought primarily at the state and local level. Many of the new drug cases now flooding the federal system could be just as effectively prosecuted in state court as in federal court. These cases find their way into federal court because Congress has provided funds only for federal and not for state prosecutions. The resulting mercurial increase in federal prosecutions will require either a massive increase in federal judicial capacity or a major cutback in federal civil jurisdiction. Either choice would alter the fundamental character of the federal courts.

No fundamental change in the federal courts is necessary to combat the drug crisis while equipping the federal judiciary to carry its share of the load. The federal drug enforcement strategy should be refocused (1) to limit federal prosecutions to the relatively small number of cases that cannot be effectively prosecuted by the states (because, for example, they involve international or interstate elements),[16] and (2) to employ any additional funds primarily to support effective state and local enforcement in the remaining cases. This revised strategy is the best way to fight the war on drugs and the best way to preserve the ability of the federal judicial system to play its vital and historic role of interpreting and enforcing federal law and rights as a whole.

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[14] This includes, inter alia, funding for magistrates, probation and pretrial service officers, substance abuse treatment program, defender services, and court security.

[15] Our recommendation for additional judgeships is to be considered an emergency, triage measure and should not be confused with our overall recommendation that Congress and the Judicial Conference investigate alternative means for reducing caseload before encouraging the appointment of additional judges.

Separate statement of Edward S. G. Dennis, Jr.:

Limiting federal participation in the war on drugs ignores the reality of present day law enforcement. In several major pieces of substantive and funding legislation since 1984, Congress has made a clear policy choice that drug and drug-related cases, such as forfeiture actions and money laundering prosecutions, will be a significant part of the work load of federal courts for the foreseeable future. Congress should not diminish the federal role it has legislated in drug prosecutions.

The Department of Justice has developed and followed a National Prosecution Strategy, and has forged relationships with state and local law enforcement authorities to implement that strategy. It has had the District Law Enforcement Coordinating Committee (LECC) program for the last 8 years. The LECCs were established in 1981 in all 93 federal judicial districts, and they consist of federal, state, and local investigative and prosecutive agencies. Their goal is "to improve cooperation and coordination among law enforcement groups and thereby enhance the effectiveness of the criminal justice system."

Similarly, the Organized Crime Drug Enforcement Task Force (OCDETF) offices were created in various districts around the country in 1982 to permit the Department of Justice to coordinate federal, state and local law enforcement in an effective national strategy by establishing tasK forces of federal, state and local prosecutors and investigators to undertake a unified approach against drugs. Federal policy is to coordinate with local prosecutions, not to "federalize" them. Cutting back federal participation in this national strategy is a step backwards in the nation's efforts against drugs.

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[16] The Committee is not calling for any new statutory limitation on federal drug prosecutions. The Committee is recommending that the Department of Justice exercise greater selectivity in deciding whether to bring drug prosecutions in the federal courts, since a continuation of current policies will swamp the system with cases that could and should be prosecuted in the state courts. The Committee is also recommending that Congress reallocate support for drug prosecutions, so that funds for federal prosecutions are proportional to the small size of the federal courts. If additional federal funds are available, they should be used to support state prosecutions.

The most recently published statement of overall drug prosecution strategy, the National Narcotics Prosecution Strategy, prepared by the National Drug Policy Board in early 1988, describes a three-level federal strategy. Overall, the "strategy is designed to ensure that state and local law enforcement authorities are properly staffed, equipped, funded, and trained to maximize the impact of drug enforcement efforts within their jurisdictions."

Strategy 1 seeks to identify the major traffickers responsible for narcotics importation and distribution. Strategy 1 targets are defined as one of several classes of persons including those who operate significant national and international enterprises, enterprises operating within exclusive federal jurisdiction (such as on the high seas or abroad), and significant local and regional violators who have been designated for federal prosecution by an LECC.

Strategy 2 calls for "the federal government to provide training and assistance to help state and local authorities in their pursuit of large intrastate enterprises and, in some jurisdictions, to help formulate legislative proposals creating the necessary statutory tools to ensure that violators are adequately punished and their assets completely forfeited."

Strategy 3 calls for federal prosecution of those cases which must be prosecuted "in order to maintain public confidence in law enforcement, avoid the perception of gaps in narcotics enforcement, respond to urgent or developing local drug problems, and assist and complement state and local law enforcement efforts." Federal prosecutors take great pains to prosecute only those cases that the states cannot handle. The Southern District of Florida declination guidelines on cocaine cases, for example, call for the referral of seizures of less than five kilos to the state for prosecution, except for airport and seaport seizures where seizures of less than one half a pound are to be referred to local authorities.

Airport and seaport cases are, of course, highly indicative of importation, and importation cases are properly the concern of the federal government.

Underlying the Committee's recommendation is the assumption that the increased burden on the courts is due to the federal government's straying from its federal mandate. The federal caseload has increased because federal law enforcement is doing what it is supposed to be doing. Drug cases have become more complex; pretrial detention hearings and forfeiture proceedings require court time in excess of the traditional trial. The rise in federal prosecutions is not due to a flood of nickel bag "buy/bust" prosecutions; more cases that are being investigated simply match the federal profile.

The mere fact that smaller drug cases may appear periodically in federal court should not be taken as a sign that there has been a breakdown in federal coordination of drug prosecutions. The smaller cases brought in federal court may be a result of the increased use of drugs in areas where the federal government has exclusive jurisdiction or in border smuggling cases. On the other hand, they may be predicates to broader investigations that are ultimately aimed at large-scale prosecutions fitting the more traditional federal profile. In coordination with state and local prosecutors, federal investigators and prosecutors may target a criminal enterprise that is best attacked initially from the street level distributor.

Finally, those incentives cited in the Committee's recommendation that may now exist to bring cases into federal court instead of state court (e.g., forfeiture provisions, pretrial detention, harsher sentences) are being lessened as the state legislatures are following the federal government's lead in enacting stiffer laws. To this extent, the federal government has played an entirely appropriate role in providing an example for legislation and enforcement to the states. For these reasons, I dissent from the recommendation.

PAROLE ELIGIBILITY HEARINGS ("OLD LAW" PRISONERS ONLY)

- Congress should extend the life of the U.S. Parole Commission (or create a successor agency) to hold parole hearings for "old law" prisoners as long as any "old law" prisoners remain in the federal correctional system.

The Sentencing Reform Act of 1984 provides for the abolition of the U.S. Parole Commission in 1992. Long after that date federal prisons will still house prisoners serving "old law" sentences, i.e., sentences that were imposed under the preexisting law that provided for parole. Presently no provision exists for any agency to assume the function of determining the eligibility for parole of such "old law" prisoners when the Parole Commission is abolished in 1992.

Unless some agency is authorized to determine the eligibility of such "old law" prisoners, these prisoners, who will be entitled to court-ordered release before the completion of their sentences, will remain incarcerated. However, the ex post facto clause of the Constitution forbids making the penalty for an offense more onerous once the offense has been committed. As this clause has been interpreted, the Committee thinks that making parole unavailable for an offense subject to parole at the time of commission would be unconstitutional. Accordingly, unless Congress authorizes some agency to consider "old law" prisoners for parole, after 1992 a large number of "old law" prisoners will bring ex post facto claims in federal court under 28 U.S.C. § 2255 challenging their continued incarceration. Since these claims would presumably be meritorious, we believe that the federal courts would have to order the release of these prisoners.

In enacting the Sentencing Reform Act, Congress gave little consideration to the problems that would be posed by "old law" prisoners. The failure to provide for some agency to assess parole eligibility of the "old law" prisoners was an oversight that should be corrected now, before it results in burdensome federal litigation and the release of potentially dangerous federal prisoners.

PAROLE REVOCATION HEARINGS ("OLD LAW" PRISONERS ONLY)

- Congress should extend the life of the U.S. Parole Commission (or create a successor agency) to hold parole revocation hearings for "old law" prisoners who are alleged to have violated the conditions of their parole after 1992.

As discussed above, The U.S. Parole Commission is scheduled for abolition in 1992. At that time, the Sentencing Reform Act will transfer the responsibility for holding parole revocation hearings to the federal courts. The burden on the courts will be a substantial one, although it will decrease over time as "old law" prisoners finish serving their sentences. The Parole Commission estimates that in the first year following the Commission's abolition (1) 16,000-20,000 "old law" prisoners will be on parole, and (2) it will be necessary to hold approximately 1,300 revocation hearings involving these parolees.

In abolishing the Commission, Congress shifted the parole revocation function to the federal courts for lack of any other obvious alternative. Assuming that Congress extends the life of the Parole Commission (or creates a successor agency) as is suggested above, this agency should retain jurisdiction over parole revocation hearings. No persuasive reason has been stated for shifting these hearings to the federal courts, which are already overburdened.

HEARINGS ON REVOCATION OF SUPERVISED RELEASE

- **The federal district courts should retain jurisdiction over hearings on government petitions to revoke supervised release, but Congress should authorize district judges to refer the hearing and final decision regarding revocations to United States magistrates.**

Although there are still many "old law" prisoners in the federal system, the Sentencing Reform Act of 1984[17] abolished parole and created the concept of supervised release. Unlike parole, supervised release was not intended to be subject to revocation. Later legislation, however, erased the sharp distinction between parole and supervised release by providing that violation of the terms of supervised release could result in revocation of release, and thus result in reimprisonment. The district courts were authorized to conduct hearings on the revocation of supervised release.

Although only a trickle of cases have been seen to date, when the new system becomes fully operative the burden of hearings (on the revocation of supervised release) will be substantial. Although it is not possible to project the caseload with precision, the Parole Commission estimates that by 1992, approximately 3,500 hearings per year will be held on the revocation of supervised release.

This proposal is based on the resolution adopted by the Judicial Conference Committee on Criminal Law and Probation Administration. The Judicial Conference

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[17] P.L. No. 98-473, tit.II, Ch.II, 98 Stat. 1987.

Committee takes the position that the consequence of revoking supervised release is so severe that the individual should be entitled to a judicial hearing, not merely an agency hearing where the presiding officer will be a corrections official rather than a law-trained judicial officers. The Committee's resolution observes that "supervised release is analogous to the imposition of a new sentence after the original sentence has been served. Sometimes it will be a long sentence." An individual does not begin a term of supervised release until he has served his entire sentence of imprisonment. (In contrast, parole has traditionally been regarded as a matter of grace since the prisoner is released before he completes his full term of imprisonment.) If an individual violates the terms of his supervised release, he may be reimprisoned for all or part of the authorized term of supervised release (without credit for the time he already served on post-release supervision). For some offenses both supervised release and reimprisonment upon its revocation may be for as much as 5 years. Even assuming that there is no theoretical difference between parole and supervised release, the terms of reimprisonment can be so long that a judicial hearing should be provided.

In order to reduce the strain on the courts, the Judicial Conference Committee favors legislation allowing district judges to refer both the hearing and final disposition of supervised release revocation to U.S. magistrates. The Committee is also exploring other ways of expediting consideration of these cases.

In the alternative, some members of the Committee are of the view that Congress should transfer jurisdiction over hearings to revoke supervised release from the federal district courts to the United States Parole Commission or its successor.

4. Section 1983 Litigation: Exhaustion of State Remedies in State-Prisoner Suits

- Congress should amend 42 U.S.C. § 1997e to (1) delete the minimal standards required by § 1997e(b); and (2) provide that federal courts in suits brought by state prisoners under 42 U.S.C. § 1983 shall require the plaintiff to exhaust his state administrative remedies for a period of 120 days, provided the court is satisfied that the remedies are fair and effective.

Exhaustion of state administrative remedies is generally not required in suits under 42 U.S.C. § 1983. However, 42 U.S.C. § 1997e requires such exhaustion in state prisoner cases if the prison provides an administrative remedy that has been certified as adequate by the Attorney General of the United States, or by a federal court. But the procedures of the Justice Department for certifying a state's system are slow and the substantive standards (especially those requiring inmate participate in the design and administration of the system) are onerous from the states' perspective. As a result, few states have sought or obtained certification under this statute. Meanwhile, the federal courts are inundated by state prisoner suits, most lacking merit and many of those that are meritorious seemingly amenable to administrative resolution.

Section 1997e has not succeeded in its aim of encouraging state administrative resolution of prisoner civil rights claims; the Committee therefore recommends that it be amended. The key to making this statute more effective appears to be greater flexibility in the requirements for a satisfactory remedy. There is no need to impose specific minimum requirements. Federal prisons do not follow these same procedures, and some states have implemented effective administrative remedies that do not conform to present 1997e. Accordingly, we recommend that the state be allowed to persuade either a federal court or the Attorney General that its remedy is fair and effective. If the prison makes this showing, the prisoner should be required, for a period not to exceed 120 days, to first seek relief there. The burden of showing that its remedy is fair and adequate lies on the state.

Since these are rarely "fast track" cases, the period of exhaustion should not cause a substantial hardship on the prisoner -- and in cases where it would, this hardship would be grounds for the district judge's declining to find the state remedy fair and effective in those circumstances.

If only a small fraction of prisoner cases were successfully resolved by the administrative route, the saving in judge time would still be considerable because of the enormous volume of these cases. Even were a dispute not settled at the administrative level, the record compiled there might assist the district judge in his or her determination (though we do not believe that this record should have any formal preclusive effect). Exhaustion is required in all federal prisoner cases, and the requirement has not proved onerous even though there is no time limit, as there is under our proposal.

B. CREATION OF SPECIALIZED TRIBUNALS

1. Social Security Disability Review

- Appellate review of social security disability claims in the general courts of appeal should be confined to constitutional claims and issues of law only.
- A new Article I court, the Court of Disability Claims, modeled on and perhaps joined to the Veterans' Disability Court, should be established to review decisions on social security disability benefits entered by the Administrative Law Judges.
- The Administrative Law Judges should be removed from the Social Services Administration and be established as an independent corps.
- Efforts should be continued to improve both the quality of the record and the determinations made at the state level.

Currently, social security disability claims are reviewed in five stages: (1) an initial determination (with a right to reconsideration) at the state level; (2) a hearing before an Administrative Law Judge; (3) review by the Appeals Council of the Social Security Administration; (4) review in the district court on the administrative record; and (5) de novo review of the district court's decision by the court of appeals. Not only is the administrative process cumbersome and duplicative, but recent experience demonstrates that it is vulnerable to political control. Strengthening the administrative process, we think, should mitigate the need for judicial review. Accordingly, the Committee makes several recommendations for reformation.

In recent years, the Social Security Administration has made controversial efforts to limit the number and amount of claims granted by the ALJs; as a result, it has been asserted that the ALJs' independence has been improperly compromised.[18] From the ALJ, appeals are heard by the Appeals

Council of the Social Security Administration, which lacks even the independence of ALJs protected by the Administrative Procedure Act. To summarize, the system is plagued by inadequate administrative review, followed by duplicative review by Article III courts.

One proposal for improving the review process advocates termination of the claimant's right of appeal at the district court level. This proposal was rejected on the ground that this would make social security claimants "second class citizens" and that the district courts are ill-suited to perform these appellate functions. A second proposal establishing a specialized court of appeals for disability cases (i.e., the proposed Court of Disability Appeals) as an Article III court, was also rejected on grounds that the heavy caseload would require the appointment of too many Article III judges.

Recognizing that the principal issues in social security disability cases are factual and technical, we propose to attract to the administrative level competent specialists in disability law by encouraging the independence of the administrative law judges and creating an Article I court of disability appeals. These two changes, we believe, will provide a superior examination of the facts than the federal district courts currently provide. If necessary, further review would be to the courts of appeals. Review would be confined to constitutional claims and issues of law. An additional tier of review for questions of fact, such as is presently provided by the courts of appeals, is not necessary. This is true even for questions concerning the sufficiency of evidence, which would not be considered questions of law. We therefore contemplate fewer appeals to the Courts of Appeals.

The Appeals Council of the Social Security Administration should be divested of its adjudicative function and be reconstituted as an agency to develop and revise the regulations that guide the adjudication of social security disability cases; its relationship to the ALJs and the Court of Disability Appeals could resemble that between OSHA and OSHRC (the Occupational Safety and Health Review Commission).

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[18] See Social Security Disability Reviews: The Role of the Administrative Law Judge, Hearings Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 98th Cong., 1st Sess. (1983); D. Cofer, Judges, Bureaucrats and the Question of Independence: A Study of the Social Security Administration Process (1984).

Conceivably, the Court of Disability Appeals could eventually adjudicate appeals from all decisions by administrative law judges under federal disability programs, including the veterans' claims now handled by the newly created court of veterans' appeals (a model, indeed, for our proposed court of disability appeals). It is hoped that the enhanced power and prestige of such a court would attract the ablest specialists in disability law. The broader its jurisdiction, the more the new court will alleviate the Article III judiciary's disability caseload.

To summarize, our proposal would increase the amount and quality of meaningful review that social security disability claimants receive, while significantly reducing appellate federal judicial workloads at both the district court and court of appeals levels.

As an alternative to the creation of a specialized court to hear Social Security appeals, it has been suggested that consideration be given to reconstituting the existing Appeals Council in the format presently exemplified by the Benefits Review Board. This administrative appellate entity reviews findings by ALJs in Black Lung as well as Harbor and Longshore Workers cases in which disability claims are in dispute. The Benefits Review Board has been generally considered successful and the model could be adopted in the Social Security claims area. This proposal offers several advantages:

1. It would not contravene the general policy against creating specialized courts, particularly one with a very narrow focus;

2. The structure has been thoroughly tested;

3. It would offer a career track to ALJs and make their positions more attractive;

4. It would not increase the number of courts;

5. It would be expected that its process would be less formal and less expensive than traditional court procedures.

This suggestion extends also to an alternative to the proposal that Article III judicial review in Social Security cases be confined to the Courts of Appeals. Any provision for Article III court review must recognize the critical problem of overwhelming caseloads in the Courts of Appeals. The district court are also struggling with heavy dockets. However, the total number of district judges far exceeds the number of three-judge panels which could be constituted in the Courts of Appeals. It follows that providing Article III review by channelling Social Security appeals to the district judges would result in a far lighter burden per judge than providing for initial review in the Courts of Appeals.

If this proposal were adopted, it would be possible to continue review of the substantiality of the evidence, a critical element in reviewing Social Security claims.

The same allocation of finite resources would be appropriate in Black Lung cases and Harbor and Longshore Workers cases where review is presently had in the first instance in the Courts of Appeals. In those administrative law cases and in others such as NLRB appeals, Article III review should be in the district courts initially with resort to the Courts of Appeals, by leave, to maintain uniformity of law. Again, the burden placed on the district judges would be far less than that on the Courts of Appeals.

2. U.S. Tax Court Reform

- **The U.S. Tax Court should be transformed into an Article III court with exclusive jurisdiction in both trials and appeals over federal income, estate, and gift tax cases.**

The present system of federal tax adjudication is structured irrationally and fosters the development of conflict in the interpretation of the tax laws. It is unfair to some taxpayers, encourages forum shopping and provides additional incentives for taxpayers to play the "audit lottery." Under current procedures, a tax claimant can choose from three separate fora: the U.S. Tax Court, the U.S. Court of Claims or the local U.S. District Court.[19] Appeals from the district courts are heard by the federal courts of appeals. Similarly, appeals from the U.S. Tax Court are heard by the court of appeals for the circuit in which the taxpayer resides. Appeals from the Claims Court are heard by the Court of Appeals for the Federal Circuit.

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[19] A taxpayer who pays under protest a tax assessed against her can bring a refund suit in the federal district court where she resides or in the Court of Claims in Washington, D.C. Or she can decline to pay the (continued...)

Accordingly, trials of tax matters are heard in three separate courts and appellate litigation in the tax field is sorted out among the twelve regional courts of appeals and the Federal Circuit. Few of these courts have the time or the substantial volume of tax appeals necessary to develop expertise in what is one of the most highly specialized and technically demanding fields of law in American jurisprudence.

The Committee believes the current system is unduly complex and in need of reform. Although the reformation proposed would not provide substantial workload relief to the district and appellate courts (because the total volume of tax litigation is not high),[20] reform still is sufficiently desirable that it deserves treatment in this Report.

Accordingly, the Committee proposes to transform the U.S. Tax Court into an Article III Court with exclusive jurisdiction over federal tax litigation at both the trial and appellate levels.[21] This proposal could be accomplished by dividing the current Tax Court, which consists of nineteen judges, into two divisions -- a trial division and an appeals division. Article III status would be conferred on the Tax Court judges. The Internal Revenue Service would represent the government at the trial level; the Department of Justice would handle the appeals.

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19. (...continued) assessed tax and contest the deficiency in the U.S. Tax Court, an Article I court comprised of 19 judges located in Washington, D.C., but riding circuit.

[20] 95% of the current tax caseload is handled by the nineteen judges of the Tax Court.

[21] Although enforcement actions (e.g., the fixing of jeopardy assessments and the enforcement of federal tax liens) would remain in the district courts.

Presumably, the initial membership of the court would consist of the judges of the present Tax Court plus additional judges as are necessary to handle its increased trial workload and the federal tax appellate workload now divided among the thirteen federal courts of appeals. Since the Tax Court already handles approximately ninety-five percent of all federal tax cases, we believe only a modest increase in the number of judgeships would be necessary to handle the court's increased workload at the trial level. In fact, the Committee estimates that only one or two more judges need be appointed at the trial level, and that five additional judges would be needed to hear appeals.

The court presumably would be located in Washington, D.C., as it is now, and its judges would ride circuit as they do now (and possibly hear appeals as well). Depending on the distribution of cases, it may be desirable to establish regional courts, so that the judges could ride smaller circuits. As in the present Tax Court, litigants would have no right to a jury trial.

The Article III status of the judges should insulate them from undue influence by the Treasury Department and would thus eliminate the need to provide taxpayers with "competitive" alternatives in the federal district courts and in the Claims Court.

Our proposal, if implemented, should (1) reduce forum-shopping, (2) simplify tax adjudication, (3) relieve (albeit modestly) the workload pressures on the traditional Article III courts, (4) reduce the pressure on the Supreme Court to grant certiorari in tax cases to resolve intercircuit conflicts, (5) provide greater protection to the taxpayer by assuring access to an Article III court (now available as a practical matter only to those taxpayers able to pay the assessed tax and then sue for a refund), and, above all, (6) increase the quality and uniformity of tax adjudication by shifting it from overworked judges sitting in a large number of diverse courts to a court of highly trained specialists.

Five members of the Committee, including a representative from the Department of Justice, believe the Committee's recommendation does not have sufficient support within the tax bar to merit attention. They also expressed concern that this new Article III court may be asked to resolve federal issues other than federal tax questions when hearing a "mixed" case involving a federal tax question and a nontax federal question. They expressed uncertainty whether the new Article III Tax Court judges should review nontax federal issues, as well.

Also, they stressed that many of the issues raised in tax cases are state law issues and are more properly heard by a local federal court of appeals. They also argued that the taxpayer's confidence in the fairness of the tax system depends, in part, on the viability of his or her access to the regional courts of appeals, an option that would be foreclosed under the Committee's proposal.

Separate statement of Edward S.G. Dennis, Jr.:

The Committee's proposal would consolidate judicial review of most tax controversies in a single specialized court. That position has been rejected by those most intimately connected with the tax litigation system: the Internal Revenue Service, the Justice Department, the Tax Court and a Task Force established by the Tax Section of the American Bar Association. There is ample evidence that the existing system of tax litigation is performing well, serves important interests and does not impose an undue burden on either the district courts or the courts of appeals. We therefore dissent.

The majority's proposed reforms cannot be justified in terms of relieving the workload of the federal judiciary. Available statistics support that conclusion.

The majority maintains that the current system of judicial review has produced a "substantial" number of unresolved intercircuit conflicts on tax issues. However, the Justice Department has indicated that, of the approximately 1500 appeals it handled in 1987 and 1988, there were at most five unresolved and currently-significant conflicts. Similarly, a recent study conducted by the University of Virginia Tax Law Review found that, from 1983 through 1987, there were only 35 intercircuit tax conflicts, more than half of which appear to have been either resolved by the Supreme Court or otherwise mooted.

The majority asserts a need to have tax cases heard by judges with special expertise. We do not agree. We believe that generalist judges perform a critical role in the adjudication of tax disputes. Particularly, at the appellate level, generalist judges provide balance, allowing the technical expertise of the Tax Court to be complemented by a general legal consideration that enrich the field of taxation and helps ensure that the tax laws are understandable to the public.

This brings us to our most important point. We are gravely concerned that centralizing substantive tax disputes in a specialized trial and appellate court would leave the American taxpayer with the impression that the judicial system is remote and unresponsive. In the end, this perception could undermine the voluntary compliance with the revenue laws that all concede is the cornerstone of our system of taxation. This concern is shared by both the public and private tax bars. In his letter to the Committee, the Commissioner of Internal Revenue, for example, stated that the perceptions of the nation's taxpayers are of "utmost importance," and that he fears that the proposed reform could "reduce taxpayer confidence" and undercut voluntary compliance. The Commissioner also pointed out the value of extending to the taxpayer the option of having the case heard by a local judge.

We believe that in the field of taxation, the perceptions of the public assume an importance that are more critical than they may be in other areas. The majority's proposal runs contrary to that important consideration. The evidence indicates that the problems of inconsistent judicial rulings is not a substantial factor in the field of taxation but in any event, the problem of intercircuit and intracircuit conflicts demands a systemwide solution rather than one confined to one narrow area.

We therefore see no need to revise the present structure for litigating federal tax controversies other than to recommend that the jurisdiction of the Court of Claims in this area be deleted as being redundant to that of the Tax Court and the district courts.

3. Bankruptcy Appellate Structure

- Each circuit should establish "bankruptcy appellate panels" (BAPs) with the provision that joint panels may be created with neighboring circuits.

- Congress should amend the laws governing appeals in bankruptcy cases in two respects:

  (a) Provide that the consent to findings of a bankruptcy judge in "non-core" proceedings be implied unless an objection to them is raised within thirty days;

  (b) Amend 28 U.S.C. § 1334, 28 U.S.C. § 1452, and 11 U.S.C. 305, to clarify that these statutes forbid appeals only from the district courts to the courts of appeals, rather than from bankruptcy courts to the district courts.

The Committee recommends that the Judicial Councils of each circuit establish "Bankruptcy Appellate Panels" (BAPs).[22] Where currently utilized,[23] BAPs have reduced the workload of both the district courts and the courts of appeals, while receiving favorable review from both bench and bar.

In those circuits without BAPs, bankruptcy appellate structure resembles the system used in social security disability cases and is subject to the same criticisms. Bankruptcy appeals are heard by the district judge who functions purely in an appellate role. Once his work is completed, the review process is duplicated by the court of appeals, whose review of the district judge's legal determination is plenary.

In the Ninth Circuit, however, the parties to a bankruptcy matter can agree to have their bankruptcy appeal heard by a BAP. We favor this system because it fosters expertise and increases the morale of bankruptcy judges, in part by creating an appellate career track. In addition, BAPs have reduced the number of bankruptcy appeals, thereby significantly alleviating work load

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22. The Bankruptcy Reform Act of 1978, 11 U.S.C. 101 et seq., provides that decisions of the bankruptcy judge are to be heard by the district court, and from there, by the court of appeals. If the parties so stipulate, an appeal can be taken directly to the court of appeals. This Act also provided a third option: If a circuit council desired, it could establish "bankruptcy appellate panels" (BAPs) to hear appeals from judgments and orders entered by a bankruptcy judge instead of the district court. Decisions of a BAP, which consists of three-judge panels of bankruptcy judges, could be appealed to the court of appeals.

23. Only two circuits have established BAPs. The First Circuit established a BAP in 1980 to hear appeals from all districts in the circuit except the District of Puerto Rico. The Ninth Circuit established a BAP in 1979 to hear appeals from two of the 13 districts within the circuit. In 1980, the Ninth Circuit BAP was expanded to cover four additional districts. The First Circuit BAP ceased to operate shortly after Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) was issued; the First Circuit chose not to reestablish BAPs after enactment of the 1989 amendments. The Ninth Circuit BAP has never ceased operating. In 1987 and 1988, it disposed of 902 appeals and 664 appeals, respectively.

pressures on both the district courts and the courts of appeals.

At present, only the Ninth Circuit uses such panels, but we believe the BAP's well-studied success warrants experimentation nationwide. Small circuits should be encouraged to form multicircuit bankruptcy appellate panels since the First Circuit's experiment encountered difficulty with a small number of bankruptcy judges in the circuit and the resulting difficulty in staffing panels at locations convenient to the parties.

(a) Consent in "Non-Core" Proceedings

Under 28 U.S.C. § 157(c)(2), a bankruptcy judge may enter final orders and judgments in non-core[24] proceedings, subject only to traditional appellate review "with the consent of all the parties." This language does not say whether the consent must be express or implied, but Bankruptcy Rules 7008 and 7012 interpret it to require express consent. We recommend amending the statute to provide that the parties to a non-core proceeding will be deemed to consent to the entry of orders and judgments by the bankruptcy judge unless a timely objection is made.

This amendment will reduce the workload of the district court by eliminating the need for de novo district court review in non-core proceedings where no timely objections have been filed. An implied consent rule might also reduce litigation over whether a proceeding is core or non-core, because the question will be moot if no party timely objects to the bankruptcy judge's judgment in the matter.[25] Finally, implied consent will eliminate the problem that presently exists in default cases, where the plaintiff often finds it difficult to obtain express consent.

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[24] With respect to matters heard by the bankruptcy judge, the 1984 Bankruptcy Amendments and the Federal Judgeship Act of 1984, 28 U.S.C. 158, draw a broad distinction between "core proceedings," which are matters centrally related to administering the bankruptcy case or involving rights arising under the Bankruptcy Code, and "non-core proceedings," a residual category of matters otherwise related to the bankruptcy case. In core proceedings, the bankruptcy judge functions in the manner envisioned by the 1978 Act, conducting hearings and entering final orders subject to appellate review by the district court. In non-core proceedings, the bankruptcy judge conducts hearings, but unless the parties consent to his decision, his findings must be submitted to the district court and have no force unless adopted by that court after de novo review.

Implied consent in this context should pass constitutional muster. Indeed, the proposal is essentially one to treat findings of a bankruptcy judge the way many courts already treat findings of a magistrate -- a procedure the Supreme Court held constitutional in Thomas v. Arn.[26] Furthermore, the Second, Sixth, and Ninth Circuits have each held that a bankruptcy judge may appropriately enter a binding order in a non-core proceeding in the absence of either any express consent or objection.[27]

(b) Needed Statutory Amendments

Finally, we recommend that 28 U.S.C. § 1334, 28 U.S.C. § 1452, and 11 U.S.C. § 305 be amended. These statutes provide that orders regarding abstention or remand of certain bankruptcy claims are unreviewable "by appeal or otherwise." Although undoubtedly intended to disallow appeals on these matters from the district courts to the courts of appeals, these statutes have been interpreted to preclude any appeal from an initial decision maker -- including a bankruptcy judge. Thus, the bankruptcy judge's recommended findings have no force or effect until entered by the district court.

This practice produces considerable delay in resolving these motions, which is contrary to the purpose of the prohibition on appeal. We recommend amending these three statutes to clarify that they preclude only appeals from the district court to the courts of appeals. This procedure would enable bankruptcy judges to treat motions to abstain or remand as core proceedings and to enter binding orders subject to review in the district court. This procedure will speed the disposition of such motions, better effectuating the purpose of the limitation on appeals from the district courts to the courts of appeals.

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[25] See In re Men's Sportswear, Inc., 834 F.2d 1134, 1137 (2d Cir. 1987).

[26] 474 U.S. 140 (1985).

[27] See In re Southern Industrial Banking Corp., 809 F.2d 329 (6th Cir. 1987); In re Men's Sportswear, Inc., 834 F.2d 1134 (2nd Cir. 1987); In re Daniels-Head & Associates, 819 F.2d 914 (9th Cir. 1987). In all three cases, Bankruptcy Rules 7008 and 7012, which require express consent, were not yet applicable.

4. Administrative Agencies: Review of Orders

- **The Committee opposes the consolidated review of federal administrative agency orders in a specialized Court of Administrative Appeals.**

The Committee studied a proposal urging the creation of a national Article III Court of Administrative Appeals,[28] that would have exclusive jurisdiction to review the orders of the federal administrative agencies. The proposal initially was thought attractive because (1) administrative law is becoming an increasingly technical body of law; (2) review of orders of administrative agencies seldom overlaps or involves other fields of law; and (3) much federal administrative review already is concentrated in the Court of Appeals for the District of Columbia Circuit.

The Committee examined this proposal with care and concluded that, although there are strong arguments in favor of establishing such a court, such consolidation should not be encouraged, primarily because the ensuing court docket would be unmanageable. Although the number of direct review appeals from administrative agencies to the federal courts of appeals is not overwhelming -- approximately 3,000 a year -- this number is misleading in terms of overall impact on the court's workload. First, an administrative review case is sometimes more taxing and requires greater expenditure of judicial resources than the average federal appeals matter. Second, and more important, in addition to the 3,000 direct appeals, many more administrative cases involve challenges to administrative action that is sufficiently final to be reviewable under the Administrative Procedure Act, but is not within the scope of any specific statute vesting jurisdiction directly in the courts of appeals. Rather than being challenged directly in the court of appeals, then, such actions are brought in the federal district courts, with a right to appeal to the courts of appeals. To achieve the goal of centralized administrative review, however, these appeals also would have to be vested in the new court -- resulting in a very large, multi-divisioned court that would suffer problems of coordination and uniformity not unlike those of the present system. Accordingly, the Committee concluded that the gains of such centralization were not worth the costs.

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[28] Two other proposals were considered: (1) establishing the administrative court in the existing D.C. Circuit Court of Appeals, and (2) giving the D.C. Circuit the power to review the administrative decisions of other circuits en banc with the results in D.C. to be binding nationally, subject to Supreme Court review. These proposals, too, were rejected because the Committee thought the D.C. Circuit Court of Appeals would have to be greatly enlarged in order to handle the resulting number of administrative appeals, and establishing it as an intermediate court would result in only incremental gains in uniformity.

C. NON-ARTICLE III ADJUDICATION

1. Alternative Dispute Resolution

Introduction

The term "alternative dispute resolution" has come to cover a broad range of approaches to dispute processing apart from traditional pretrial and trial under courts' general procedural rules, and it often means different things to different people. The number of ADR approaches is numerous and growing as courts and disputants continue to experiment and innovate. Voluntary, binding arbitration is long established and will continue to exist largely outside the judicial system, as will much voluntary conciliation, mediation, and negotiation. The word "alternative," however, may exaggerate the distance between many ADR devices and judicial dispute processing, for courts are making increasing use of "ADR" techniques -- and those techniques themselves, such as various forms of judicial involvement in settlement discussions, often took place before the current movement made people think of classifying them as "alternatives." ADR, then, can be independent of the courts or used formally or informally (and with or without the parties' consent) in connection with court proceedings. It can either be a fairly novel device or an aspect of traditional proceedings that may simply be viewed from a new perspective in light of increasing focus on resolution of disputes without full judicial trial.

Among the most common ADR approaches, in addition to those already mentioned, are the somewhat misleadingly named "court-annexed arbitration," which most commonly requires a non-binding hearing and award some months after court filing and before the parties may proceed to trial if they do not accept the award or settle; the less formal "early neutral evaluation" procedure, in which an experienced, neutral attorney meets together with the parties and counsel fairly soon after filing to discuss issues in a case and evaluates strengths, weaknesses, and possible claim values; having a magistrate, or a judge other than the one who will preside at trial, take part in settlement discussions; optional "fast track" proceedings that provide for limited discovery and early trial; use of special masters for such matters as discovery management in complex cases; and the "summary" (advisory) jury trial, generally used late in the pretrial process to try to facilitate settlement in a case that might require an extensive trial. The goals meant to be furthered by ADR techniques are many and varied, most prominently including reduction of cost, delay, and antagonism in civil litigation. Additionally, however, ADR proponents argue that various alternative approaches can suit many kinds of disputes better than do full, traditional judicial trials. The idea is to "make the forum fit the fuss," and to use "tracking" by case size or other characteristics if another means might be better adapted to the needs of a particular dispute or type of case. Another major emphasis is promoting early, inexpensive, fair and amicable settlements -- which can make an especially great contribution to efficiency and justice because the vast majority of cases filed never reach trial.

From the point of view of an often overloaded judicial system, of course, one key function of ADR can be help in dealing with mounting caseloads. Depending on the future growth of the federal courts' criminal, particularly drug, caseload, alternatives on the civil side are likely to become increasingly essential. If backlogs delay regular justice so much that it is often denied, ADR mechanisms -- if they provide speedy, inexpensive, and satisfactory dispute processing-- can enhance access to justice. Courts can also encourage use of voluntary ADR by such means as informing parties that they may opt out of court-annexed arbitration by electing voluntary, binding arbitration, and by treating lawyers' commitments to arbitration hearings as equivalents to trial commitments.

ADR has many critics as well as supporters, and their concerns warrant serious attention in considering and framing ADR approaches. Perhaps most prominent is a double-edged "second class justice" argument: On the one hand, mandatory court-annexed ADR can itself provide a process that is second class in relation to full trial. Those required to go through ADR proceedings often have smaller disputes and fewer resources -- and see their constitutional right to trial receding ever farther beyond the horizon. On the other hand, voluntary ADR often means that those who can pay for it opt out of a second-class regular justice system, leaving it to those with no realistic alternative of their own. In both public and private ADR, there can also be reason for concern if the parties are not fairly evenly matched. Moreover, encouragement of settlement can compromise rights to which people are legally entitled; and elimination of cases from regular judicial proceedings can mask wrongdoing and inhibit the development of important public norms.

Yet many studies of different ADR systems report favorable results when measuring both participant satisfaction and, in some cases, effects of ADR devices on cost and delay in litigation. Many jurisdictions have gone beyond pilot programs to making various ADR mechanisms regular parts of their procedures, which seem to be quite broadly accepted by courts, lawyers, and litigants. The challenge for the federal courts is to find ways of achieving the goals and benefits while avoiding or minimizing the dangers perceived by ADR's critics. Many means are available to meet these concerns, such as categorical or individual-case exemptions form mandatory ADR proceedings, use of different judges for settlement and trial, and limits on the cost consequences that can be imposed on impecunious parties.

The proposals that follow do not suggest a single set of ADR approaches for all federal courts but endorse broadened statutory authorization for the courts to adopt local ADR rules, along with provision for a committee to advise, monitor, and report on ADR in the federal courts. A premise of this proposal is that ADR is at a mid-point in its development, beyond the stage at which it should be limited to local experiments but not so advanced as to permit the formulation of uniform national rules -- which might, given variations in local conditions, be an idea whose time will never come. The heart of the proposal, in items (a) and (b), is the "hundred flowers" authorization for local rules coupled with an advisory committee to provide help and some possible check against ill-conceived approaches. Items (c) and (d), proposing that mandatory court-annexed arbitration be among the devices that district courts be authorized to adopt and that limited experiments be permitted with fee-shifting rules, raise important issues but are separable from each other and from the broader proposals in items (a) and (b). Item (e), endorsing the concept of procedural experimentation with control groups, applies to the ADR context but is not limited to it.

(a) Congress should broaden the present authorization[29] of programs to eliminate any doubt that all federal courts may adopt local rules establishing a range of alternative dispute resolution mechanisms, including, but not limited to, early neutral evaluation, court-annexed arbitration, mediation, involvement of judges and magistrates in settlement discussions, and "summary" (advisory) jury trials. The enabling legislation should require participation by the local bar, dispute resolution professionals, and the public in the draftsmanship of local rules on alternative dispute resolution.

While ADR is a rapidly evolving and complex field, the Committee feels the field is well enough established -- and the workload problems of the federal courts great enough -- that the time for the sharply limited authorizations of 28 U.S.C. § 651-58 has passed. It may also be desirable to regularize somewhat, at least on a court-by-court basis, the profusion of individual and district variations being used in and outside the twenty districts authorized to adopt arbitration programs under 28 U.S.C. § 651-58. Such systemization would not, of course, require that the federal courts' own ADR systems supplant private and voluntary efforts. Making room for nationwide approval does not entail regarding nonjudicial approaches as weeds to be extirpated, and one of the issues that courts should consider in framing their own ADR rules would be the extent of desirable coordination and coexistence with private systems.

The Committee did not feel that it is premature to broaden ADR authorization this soon after the limited permission given with respect to court-annexed arbitration in Title IX of the Judicial Improvements and Access to Justice Act of 1988. The studies called for by that legislation are either nearing completion (with respect to existing court-annexed arbitration programs) or several years off (as to newly authorized programs). The existing forms and resources of the federal courts are under increasing pressure, and several studies of federal and state ADR programs reflect generally favorable results. Federal courts are making increasing use of a wide range of ADR methods; states and localities continue to take major strides to add ADR programs to their dispute resolution resources. Accordingly, the Committee concluded that federal district, appellate, and specialized courts should have clear authority, within certain limits, to adopt or experiment with supplements and alternatives to traditional adjudication -- *if* they choose to so do. Broader authorization for federal local court ADR rules, of course, would not necessarily mean that most courts would seek to institute major ADR programs.

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[29] Now limited to twenty federal judicial districts. See, Judicial Improvements and Access to Justice Act of 1988, 28 U.S.C. 651-58.

The Committee does not recommend uniform national ADR systems or national provision for specific ADR mechanisms because both local conditions and the views of judges and the users of the justice system vary so greatly. Judges and the bar in some districts seem eager to use such ADR mechanisms as mandatory court-annexed arbitration; in other districts the bench strongly opposes that idea but is favorably disposed toward other ADR approaches. Similarly, simplified "fast-track" or "rocket docket"[30] rules and practices may work well in some districts but could be impractical in others, where heavy criminal caseloads might make the civil fast track a promise that the court could not keep. Because of local variation, the importance of bar support, and the likely usefulness of practitioners' advice, the proposal requires participation by the local bar in framing local ADR rules. Such participation would normally come via advisory or drafting committees which should include dispute resolution specialists and members of the public.

Also because of local variation for types of ADR devices that Congress regards as generally acceptable, we see no reason to prescribe nationwide the adoption of particular approaches at this time. Congress might, of course, wish to rule certain ADR devices or practices off limits. It could also prescribe further standards and guidelines beyond those adopted in Title IX of the Judicial Improvements and Access to Justice Act of 1988, 28 U.S.C. § 652(b)-(d). Those subsections ban mandatory arbitration in constitutional and civil rights cases, require provision for exempting cases from arbitration for good cause including complexity, novelty, or dominance of legal issues, and require local rules to assure the genuineness of consent in voluntary arbitration cases.

Given the importance of the United States government as a regular litigant in civil cases in the federal courts, there also needs to be consideration of the extent to which the federal government would be covered by ADR rules. For most purposes, the federal government should be treated like other litigants subject, of course, to certain sensible general exceptions. One means of retaining a degree of executive control over agency use of ADR would be to permit an agency to elect or authorize arbitration within the limits of the agency's authority to settle cases without prior approval of the Attorney General, as is proposed for tort claims under S. 971, the proposed Administrative Dispute Resolution Act.

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[30] Now adopted in the Eastern District of Virginia, for example.

(b) An expert committee should be created, with staff, to provide advice and information on ADR approaches and resources; to monitor the collection, analysis, and publication of data on ADR experience and experiments, and to recommend guidelines for ADR use.

The number of types of ADR devices is considerable, and so is the range of situations in which one or more of them might be used. To help courts consider the relevant goals and range of choices, and avoid repeating failed approaches, such wisdom as experience and analysis have generated must be available to districts adopting and changing their own ADR programs, and to judges considering the use of ADR devices. To a considerable extent, these functions are already well served by such offices as the Federal Judicial Center, under whose auspices the advisory group recommended in this proposal might operate.

The proposed advisory committee could make recommendations for analyzing and reporting on the characteristics and performance of ADR programs; collect and disseminate information on resources for training judges, magistrates, court administrators, and ADR neutrals on the issues and methods of ADR, settlement, and case management; develop guidelines for ADR programs; and possibly review proposed and existing local ADR rules at the request of adopting courts. A further issue would be whether any central approval, beyond compliance with relevant Acts of Congress and conformity with the Federal Rules and existing circuit requirements, should be necessary before local ADR rules take effect. To avoid possible bureaucratization, delay, and inhibition on innovation, we recommend against any special approval or clearance requirement. The advisory committee, with experience developed over time, could recommend further legislation on standards and approaches for the use of ADR in the federal court system. Its membership should include practitioners experienced in ADR, dispute resolution specialists, and probably thoughtful skeptics of ADR. It should not, of course, be the sole permissible source of advice for federal courts considering and implementing ADR programs; many organizations and experts can provide invaluable assistance as well, and one function of an advisory committee could be to act as a clearinghouse for information on such resources.[31]

> (c) Congress should permit (but not require) district court rules to include mandatory ADR mechanisms such as court-annexed arbitration, with limitations on types of cases subject to mandatory ADR reference and a required provision for motions to exempt a case from an otherwise mandated ADR procedure.

One of the more controversial issues concerning ADR in the federal courts is whether the system should require, as opposed to facilitating and allowing, certain ADR procedures. The most prominent of these is court-annexed "arbitration" -- a nonbinding hearing with an award, which, if accepted, becomes the unappealable judgment of the court but with either side free to reject the award and demand a regular trial de novo. The main arguments against such provisions are that they burden excessively, and perhaps unconstitutionally, the right to trial by jury, that they too often add a further step to processes that are already long and costly, and that they provide "second class justice."

The case for allowing mandatory reference, which we recommend, points to consistent upholding of the constitutionality of such arrangements, which invariably allow full de novo trial unless the parties voluntarily agree otherwise. Mandatory reference can often be essential, despite the benefits of ADR, to overcome an adversary's reluctance to agree to anything the other side wants for fear of appearing weak.

Adding a possible layer of proceedings must be viewed in the context of overall net gain or loss in time, expense, and participant satisfaction. Numerous studies indicate that participant satisfaction is high, and that delay and party and system costs overall tend at least not to increase and in some instances to decrease. Of course some individual cases will go through full arbitration hearing *and* trial, but their numbers tend to be small; and many others conclude earlier through settlement aided by the award, acceptance of the award, or even settlement before the arbitration hearing as opposed to much later on the eve of trial. Choosing suitable categories of cases for mandatory ADR is crucial to keep down the incidence of actions going through both arbitration and trial, as is provision for motions to exempt individual cases.

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[31] *See*, *e.g.*, Memorandum from Center for Public Resources.

As for "second class justice," the cost and delay in the present system leading to full trial often deny justice and impose irresistible pressure on some parties to settle on unfavorable terms, without the chance to present their cases to a neutral party. Judging from participant satisfaction studies, such an opportunity seems to serve many of the purposes of the "day in court" that many litigants want -- and early, inexpensive, mandatory arbitration can enable more of them to get it.[32] Requiring that court-annexed ADR be voluntary in all cases would probably lead to underuse of valuable approaches, imposing too much cost on the system and its users at too little gain or saving in most cases. Given the debate over the wisdom of mandatory ADR, Congress might wish to include a sunset provision in any broadened authorization for it.

> **(d) Congress should forbid financial incentives in mandatory ADR proceedings, except as a sanction for misconduct, in connection with initial arbitration hearings but should permit use on an experimental basis of cost and fee incentives for parties rejecting awards who fail to improve on them in later proceedings, or who reject and fail to improve on a formal post-award offer of settlement. Any measures that would affect liability for attorney fees should assure that absent misconduct, impecunious claimants could not suffer net loss.**

Another issue significant to the ADR discussion is the use of financial incentives to encourage the acceptance of results from ADR proceedings. Such incentives are not an essential part of an ADR system, although they can help make parties take an ADR proceeding or its results more seriously. Cost and attorney fee consequences in this connection seem important enough, and in the case of possible attorney fee liability have enough substantive overtones, that decisions about what incentives are and are not permissible should be made by Congress and not left entirely to local rules.

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[32] See generally, Memorandum from Center for Public Resources, pp. 17-20; Rand Institute for Civil Justice, Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences (1989).

Because a purpose of many pretrial ADR hearings is to promote inexpensive access to impartial justice, such early proceedings themselves should be free of the threat of added costs except as a judicially-imposed sanction for misconduct. For some types of proceedings, such as informal "early neutral evaluation," probably no cost consequences should turn on a party's acceptance or rejection of the evaluation. After more formal proceedings such as court-annexed arbitration that provide significant discovery and hearings to disclose more about the facts and issues, a party who is willing to accept the award should probably be immune from having to bear costs of that hearing, whatever the result of any later trial. But some ADR systems do charge the costs of the hearing to a party who rejects the award and fails to do better, or to improve on it by at least ten percent at trial. Others require posting of some amount of money by a party rejecting an award. And proceedings after court-annexed arbitrations that provide some discovery, a significant hearing, and an award may be the best context in which to conduct careful, limited experimentation with the offer of settlement device, under which either party may make a formal offer. If the other side rejects the offer and does not do better (or does not come within a certain percentage of it) at trial, the adversary can lose an otherwise applicable entitlement to post-offer fees or become, to some extent, liable for the offeror's reasonable post-offer attorney fees.

Because of the consequences and intricacy of such provisions, it seems best for now to authorize their use solely in the context of the type of controlled experimentation described in the next recommendation, and perhaps only in a small number of districts. Moreover, various protections in the framing of offer devices can avoid excessively severe effects. Judges can have discretion to deny or limit an otherwise required fee award, and offer rules can specify that plaintiffs may have their recoveries reduced but not exceeded by fee liability. Another promising approach is to deduct fees not from the verdict but from the rejected offer. Legislation authorizing experiments with fee-affecting offer rules should require provisions to avoid excessively Draconian effects on those least able to face them.[33]

(e) Congress should authorize and fund sustained experimentation with appropriate guidelines and limitations, and with control groups when feasible, on the working of existing and proposed procedural devices.

Some of the most important questions about ADR devices and other procedural rules, such as whether an ADR arbitration tends to reduce pretrial delay and rates of trial or whether juries with smaller numbers increase verdict variability and reduce settlement rates, lend themselves to empirical research. To be most effective, such research must often have both an experimental population, normally selected by random, subject to one rule and a control group proceeding under the existing system. Moreover, such variations must continue long enough both to produce large enough numbers for meaningful results and to permit participants to adjust to practice under the experimental variant. Experiments conducted under such conditions can yield some of the most accurate information about the different effects that varying forms of rules may have, and can thus contribute greatly to successful procedural reform. Careful and published reports on such experiments are essential.

Experimental variation, of course, raises significant issues of justice and ethics. Depending on the type of rule involved, parties and lawyers may feel that it is unjust for them to be treated differently from others with similar cases, even with the justification of eventual betterment of the law through research on procedural rules. Sometimes such objections can be satisfied or reduced through informed consent or opt-in or opt-out provisions, which may pose the danger of compromising the validity of experimental results. Experiments must respect basic rights and cannot be justified by mere academic curiosity. An experimental device should be one that the system could seriously want to adopt if the results are positive, and money and effort should not normally be spent "experimenting" on measures that are slated for adoption in any event. A limited number of experiments have been successfully conducted in the federal judicial system, but broader experimentation is essential to better understanding of causal relationships and can contribute significantly to the improvement of the justice system.

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[33] See generally, Memorandum from Center for Public Resources, pp. 20-21; Alschuler, Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases, 99 Harv. L. Rev. 1808 (1986); Rosenberg, Rient, & Rowe, Expenses: The Roadblock to Justice--A Detailed Plan for Making Litigation Affordable, 20:3 Judges' J. 16 (Summer 1981).

On balance, the Committee strongly endorses the principle of experimentation on procedural devices and recommends legislation authorizing it, including, in some circumstances, experimental variations on otherwise similarly situated litigant populations to provide control groups for comparison in accordance with established research methodology. (To test verdict variability resulting from different jury sizes, for example, civil cases in four neighboring districts might all be tried by juries of six, eight, ten, and twelve jurors respectively over several years.) The ethical issues in such experimentation call for careful advance consideration and ongoing monitoring of experimental rule variation.[34]

2. The Federal Tort Claims Act

- **Congress should impose a $10,000 amount in controversy requirement for access to federal district courts in federal tort claims cases, and establish an alternative procedure for claims below the statutory minimum.**

The Federal Tort Claims Act,[35] which waives the sovereign immunity of the United States to suits brought due to torts of its employees, contains no minimum amount in controversy requirement. Thus, it is possible for a federal prisoner, complaining of the loss of a $2 comb occasioned by the negligence of a guard, to demand (after exhausting his or her administrative remedies) a full-scale trial before an Article III judge. Similarly, a simple suit for damage to a mailbox caused by a mailman may be litigated in federal court under the FTCA. The Committee believes a minimum amount-in-controversy requirement should be imposed for this class of case --

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[34] See generally, Federal Judicial Center Advisory Committee on Experimentation in the Law, Report: Experimentation in the Law (1981); Walker, Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments, 51:3 Law & Contemp. Probs. 67 (Summer 1988).

[35] Pub. L. 79-601, 60 Stat. 812, 842-847 (codified as amended in scattered sections of 28 U.S.C.).

one which involves routine application of common law tort principles and contains no constitutional, civil rights, or civil liberties overtones.

Note that we do not propose to use the state courts as the federal small-claims courts -- the expected consequence of establishing a minimum amount-in-controversy requirement for a particular class of federal litigation. Instead, the Committee believes that the federal system should provide alternative procedures for cases that involve an FTCA claim, but do not warrant the heavy artillery of the Article III judiciary.

The alternative procedure recommended here might be generalized to other small monetary claims against the federal government. Small cases of purely pecuniary significance do not belong in an overloaded Article III judiciary already groaning under the burden of important federal litigation.

3. Title VII: Employment Discrimination Litigation

- **The Equal Employment Opportunity Commission should be authorized under a test program to adjudicate wrongful discharge matters. Claimants would be entitled to elect between seeking relief in the district courts or before the agency, with a right of appeal in either case to the courts of appeals.**

Since 1969, the number of employment discrimination cases filed in the federal courts has increased by 2,166% -- from 336 cases in 1970, to 7,613 in 1989.[36] Over the same period, however, all other federal civil litigation has increased by only 125%.[37] The bulk of this increase in employment discrimination cases is due primarily to an enormous jump in wrongful discharge cases.[38] For example, cases challenging hiring practices outnumbered termination cases by 50% in 1966; but by 1985, this ratio was reversed by more than 6 to 1.[39]

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[36] Figures compiled from data tapes provided by the Administrative Office of the United States Courts; see also Peter Siegelman, An Economic Analysis of Employment Discrimination Litigation (unpublished Ph.D. dissertation, Yale University 1989).

[37] Annual Reports of the Director of the Administrative Office of the United States Courts.

[38] Figures compiled from data tapes provided by the Administrative Office of the United States Courts; see (continued...)

The typical discharge case -- in which an elderly person, a woman or minority worker disputes a firing or layoff-- is fact specific and seldom implicates broader issues of federal law. Accordingly, the Committee believes such a case does not lay a great claim to a hearing before an Article III judge. In addition, the stakes in many discharge cases are so small that, even with the potential to recover attorney's fees under 42 U.S.C. 1988, claimants sometimes find it difficult to litigate in an Article III tribunal due to lack of money or counsel. (Because litigating in the district courts is time consuming and expensive, attorneys are less likely to agree to take close cases). The Committee's proposal, then, may open up a new avenue of recovery for those claimants who previously were forced to forego their claims.

The Committee therefore recommends that the EEOC be authorized on an experimental basis for a five year period to adjudicate wrongful discharge cases. Claimants should be permitted to elect between (1) a remedy before the agency with a right of appeal to the courts of appeals, or (2) an action in the district court with the same appeal rights as is provided under present law. The adjudication of similar cases by the National Labor Relations Board may provide a useful model.

The Committee's proposal, if implemented, may reduce the federal docket while affording some Title VII claimants a new procedure perhaps better suited to their needs. At the same time, no claimant who desires to litigate in an Article III court will be deprived of that right. Finally, the proposed procedure will free the federal courts to devote more time to more substantial and complicated federal cases.

Some members of the Committee disagree with the suggestion that litigation between private parties be transferred from an Article III court to an administrative agency. This shift would deprive parties of the

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38. (...continued)
also Peter Siegelman, An Economic Analysis of Employment Discrimination Litigation (unpublished Ph.D. dissertation, Yale University 1989).

[39] Id.

traditionally neutral judicial forum and instead substitutes an entity in the Executive Branch whose mission is not adjudication and one which is not organized for such a function. If it is desired to institute a more informal and less expensive method of resolving some of the smaller cases, then serious consideration should be given to resolving such claims through various forms of alternative dispute resolution under the aegis of the district court.

4. FELA/JONES Act Jurisdiction

- **Congress should substitute an administrative workers' compensation system for the FELA and the Jones Act. The development of state and federal workers' compensation schemes obviates the need for federal tort remedies for railway employees under the Federal Employers' Liability Act (FELA) and, similarly, for seamen under the Jones Act. Railway employees can be covered by the relevant state workers' compensation laws; seamen can be adequately covered by the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).**

The right to bring an ordinary tort claim in the federal courts is a historical anachronism rendered obsolete by the advent of workers' compensation schemes. In the case of railway employees, the Committee proposes to leave their remedy to the state workers' compensation systems -- as is the case for employees in other forms of interstate travel (bus, truck, airplane). However, the Supreme Court has held that the Constitution prohibits this solution for employees in maritime work. For this reason, Congress established a federal workers' compensation program for maritime workers in the Longshoremen's and Harbor Workers' Compensation Act. The Committee proposes to add seamen to those covered by this Act.

(a) FELA. Currently, the Federal Employers' Liability Act (FELA) allows a railway employee to recover damages for injury resulting from the negligence of the railway or its employees if the injury was sustained in interstate commerce.[40] The Supreme Court has held that the FELA provides to railway employees their exclusive remedy for covered injuries.[41] This special federal protection for railway workers has its origin in the railways' importance to expansion in America and the federal railroad subsidization. When near the end of the 19th century public attention focused on the abuses of the railroads including the mistreatment of its workers, Congress responded by enacting precursor legislation in 1893 and 1906, and finally the FELA in 1908. The FELA abrogated for railroad employees the fellow-servant rule and the doctrine of assumption of risk, and replaced the contributory negligence defense with a rule of comparative negligence.

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[40] 45 U.S.C. 51, et seq.

Were Congress to establish today a program to provide compensation for injured workers, it would undoubtedly turn to a workers' compensation program. In 1908, the year of the FELA enactment, however, no workers' compensation programs were in effect in any state, so it is not surprising that Congress did not consider an administrative workers' compensation system when it debated the FELA.[42]

(b) The Jones Act. With regard to maritime workers, for whom the federal government has from its beginnings assumed primary responsibility, Congress, in 1920, enacted the Jones Act,[43] which permits seamen injured in the course of employment to sue under the terms expressed in FELA. Prior to that enactment, Congress had determined that the federal actions for maintenance and cure and breach of the warranty of seaworthiness were inadequate and sought to improve the situation of injured seamen by enabling them to recover under the new state workers' compensation laws. The Supreme Court upset that scheme when it held that law unconstitutional on the ground that federal law must determine the claims of injured maritime workers and seamen.[44] The Jones Act thus supplements the seamen's traditional actions for

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41. Wabash R.R. Co. v. Hayes, 234 U.S. 86 (1914); New York Central R.R. v. Winfield, 244 U.S. 147 (1917); Rogers v. Consolidated Rail Corp., 188 F. Supp. 835, 836-37 (N.D.N.Y. 1988).

42. See H. Friendly, Federal Jurisdiction: A General View, at 130 (1973).

43. 46 U.S.C. 688(a).

44. See, e.g., Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Washington v. W.C. Dawson & Co., 264 U.S. 219 (1924).

maintenance and cure and for the breach of unseaworthiness.

The advent of state workers' compensation schemes and the creation of a federal workers' compensation scheme in the Longshoremen's and Harbor Workers' Compensation Act (LHWCA)[45] have eliminated the need for the FELA and Jones Act remedies. When enacted, the latter two remedies were superior to the common law or statutory alternatives. Today, however, they are inferior to contemporary workers' compensation schemes, which are faster and less costly than a court action and do not require the claimant to prove negligence. Replacing the FELA and Jones Act with workers' compensation remedies will thus leave railway employees and seamen better off than they are now under the federal provisions.[46] Recovery under a workers' compensation scheme will also save the employees time, as well as attorneys' fees.

For these reasons, the Committee recommends that Congress substitute an administrative workers' compensation system for the FELA and Jones Act. With respect to seamen, we recommend that Congress amend the LHWCA to include seamen, thereby providing them with a federal workers' compensation scheme.

While eliminating FELA and Jones Act cases will not alone solve the caseload pressures in the federal courts, it should effect a noticeable reduction in the federal docket. In both 1987 and 1988, FELA and Jones Act cases accounted for 2% of the district courts' civil docket and 1% of the docket of the courts of appeals.[47]

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[45] 44 Stat. 1424 (1927), codified as amended at 33 U.S.C. 901, et seq.

[46] While studies suggest that awards may be smaller under workers' compensation plans, these studies do not include those workers who are afforded no recovery because they are unable to prove negligence under FELA or similar statute.

[47] See 1988 Annual Report of the Director of the Administrative Office of the United States Courts, Tables B-7, C-2 (hereafter "1988 AO Report"); 1987 Annual Report of the Director of the Administrative Office of the United States Courts, Tables B-7, C-2 (hereafter "1987 AO Report). In 1988, there were 2,540 FELA cases and 2,413 Jones Act cases out of total district court civil filings of 239,634; in 1987, there were 2,436 FELA cases and

(continued...)

Furthermore, these figures understate the impact of the FELA and the Jones Act -- at least at the district court level -- since FELA and Jones Act cases are more likely than the average federal filing to go to trial and to require a jury. In 1988, for example, FELA and Jones Act cases accounted for 4.6% of all civil trials and 7.5% of civil jury trials; in 1987, FELA and Jones Act cases constituted 5.3% of civil trials and 8.9% of civil jury trials.[48] While the number of cases affected is not great, repeal will ease the burden on the federal courts because FELA and Jones Act cases account for a disproportionate number of civil trials.

D. OTHER REFORMS

1. *Habeas Corpus* Report

- Congress should make no change regarding the standards for hearing the successive *habeas corpus* petitions of state prisoners under 28 U.S.C. § 2244.

The present rules governing the hearing of successive petitions were established by the U.S. Supreme Court in *Sanders v. United States*.[49] Under Sanders controlling weight may be given to the denial of a prior *habeas corpus* application only if (1) the same ground was presented and decided adversely to the petitioner, (2) the prior decision was on the merits, and (3) "the ends of justice" would not be served by reaching the merits of the

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47. (...continued) 2,939 Jones Act cases out of total district court civil filings of 238,982. At the appellate level, in 1988, there were 91 FELA appeals and 241 Jones Act appeals out of 32,686 total appeals, while in 1987, there were 80 FELA appeals and 245 Jones Act appeals out of 30,798 total appeals.

[48] 1988 AO Report, Table C-8; 1987 AO Report, Table C-8. In 1988, there were 12,536 civil trials and 5,448 civil jury trials. Of these, 208 were FELA trials of which 183 were jury trials, and 369 were Jones Act trials of which 225 were jury trials. In 1987, there was a total of 13,162 civil trials of which 5,565 were jury trials. Of these, 250 were FELA trials of which 222 were jury trials, and 444 were Jones Act trials of which 274 were jury trials.

[49] 373 U.S. 1 (1963).

subsequent application.[50] When grounds could have been but were not raised in an earlier petition, the merits must be reached unless the petitioner has deliberately abused the writ or motion remedy.[51]

These rules have been controversial from their inception. Some think that the "lax" standards espoused in Sanders resulted in a flood of successive petitions that needlessly undermined the states' interests in the finality of convictions. Early efforts to convince Congress to overrule Sanders failed, and instead the Court's result was codified.[52] A later effort to overrule Sanders by rule was similarly repudiated.[53] Efforts from within the Court have failed to obtain a majority.[54]

The Committee believes that no change is needed in this area. Many prisoners file more than one petition, but the chief source of these successive petitions -- changes' in law that give rise to new claims or strengthen or revive old ones -- was recently eliminated by the Supreme Court's holdings in *Teague v. Lane*[55] and *Penry v. Lynaugh*.[56]

Of greater importance is the fact that the federal courts appear to have little difficulty disposing of those successive petitions that do come before them. The absence in the reports of decisions applying the Sanders criteria suggests (and anecdotal evidence confirms) that successive petitions are usually disposed of summarily and without reported opinion. In fact, the rules governing successive petitions appear to be applied in practice as if they incorporated a res judicata principle, so that successive petitions are turned aside routinely without significant expenditure of judicial effort. At the same time, the broad formulation in terms of "abuse of the writ" and "the ends of justice" provides judges with sufficient flexibility to reach the merits in those cases that do appear to warrant further examination.

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[50] Id. at 15.

[51] Id. at 17-18.

[52] 28 U.S.C. 2244; Larry W. Yackle, Postconviction Remedies
154 at 560 (1981).

[53] See Rule Governing 2254 Cases in the United States District Court 9(b) (1976).

[54] Kuhlmann v. Wilson, 477 U.S. 436 (1986).

[55] 109 S. Ct. 1060 (1989).

[56] 109 S. Ct. 2934 (1989).

- **Congress should make no change in the law respecting fact-finding procedures in *habeas corpus* cases.**

The Committee also examined proposals that would have restricted further the power of district courts to hold evidentiary hearings. Here, too, we recommend no change. There are very few *habeas corpus* cases in which such hearings are held -- indeed, the rate of hearings is lower than for other classes of civil litigation. We believe existing standards are sufficiently strict.

In *Townsend v. Sain*,[57] the Supreme Court established when evidentiary hearings must be held to make independent findings of fact in *habeas corpus* cases. Soon thereafter, Congress amended 28 U.S.C. § 2254 and established new guidelines for when state court findings should be presumed correct. Considerable dissension over the law in this area has erupted; the chief impetus for reform seems to be the belief that federal courts should not waste valuable time reassessing something that has already been done in the state courts. Thus, advocates of reform have proposed restricting the availability of federal evidentiary hearings to those few cases in which the state court hearing was not "full and fair." Other reformers propose abolishing federal fact-finding altogether and making *habeas corpus* review a purely appellate procedure.

The Committee regards reform in this area as unnecessary at this time. Evidentiary hearings are held in very few *habeas corpus* cases. In both 1987 and 1988, only 1.1% of the petitions filed were terminated after a trial.[58] One reason so few hearings are held is that, in practice, most judges grant a hearing only if the state court proceedings were not full and fair. As a result, *habeas corpus* cases are less likely than other civil cases to go to trial. The data suggest that this is a direct result of the 1966 amendments. Accordingly, we see little need for congressional intervention at this time.

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[57] 372 U.S. 293 (1963).

[58] Annual Report of the Director of the Administrative Office, 1987-88.

- **Congress should enact legislation regulating when a prisoner can base a habeas corpus petition on legal decisions rendered after his or her conviction became final. This legislation should provide that the federal courts entertain a petition for a writ of habeas corpus only if it presents a claim that was either controlled or "clearly foreshadowed" by existing Supreme Court precedent. The district court should have discretion to address the merits of the claim if that is necessary to determine whether a proper claim is presented. In addition, the legislation should recognize exceptions to this principle if the petitioner's claim is (1) that certain conduct or a certain kind of punishment is beyond the power of the criminal law to proscribe; (2) that the absence of a particular procedure substantially increases the likelihood of an erroneous verdict; or (3) the kind of claim that is not feasible to raise in an appeal from the judgment under which the applicant is in custody.**

The question of retroactivity[59] has been a particularly sensitive issue in habeas corpus debate: if the state provides a trial that protected a defendant's constitutional rights as then understood, but a federal court later decides that the Constitution requires new or different procedures, should the state be required to release the prisoner and hold a second trial that complies with the new law? The Supreme Court addressed this issue last Term in two important cases, Teague v. Lane[60] and Penry v. Lynaugh.[61] Although the Court was split in both cases, the plurality agreed that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[62]

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[59] Last Term, in Teague v. Lane, 109 S. Ct. 1060 (1989), the Supreme Court held that a prisoner cannot seek habeas corpus relief based on changes in law occurring after his or her conviction. But the Court defined "new law" in vague terms and did not consider certain exceptions that may be necessary.

[60] 109 S. Ct. 1060 (1989).

[61] 109 S. Ct. 2934 (1989).

Furthermore, a majority appears to agree that a rule is "new" if it was not "dictated by prior precedent" -- even if the rule was already followed in every state.[63] A "new rule," in other words, is any rule that has not been expressly ratified by the Supreme Court at the time the petitioner's conviction becomes final. The Court also held that retroactivity is a threshold inquiry that must be addressed before the court considers the merits.

Finally, the Court recognized two exceptions to this general prohibition: a petitioner may base a claim on "new law" if the claim is (1) that certain conduct or a certain kind of punishment is beyond the power of the criminal law to proscribe, or (2) that the absence of a particular procedure substantially diminishes the likelihood of an accurate verdict.[64]

Teague and Penry have dramatically changed the law of habeas corpus. One might perhaps argue that Congress should leave the courts to flesh out these issues before considering legislation. But Congress successfully codified several then-recent Supreme Court decisions in 1966;[65] congressional action in this context will be equally helpful.

Teague and Penry are based on the premise that the interests of the prisoner are at their weakest, and those of the state at their strongest, when the state court correctly applied law that has since been changed. In those cases, habeas corpus does not deter state courts from ignoring federal constitutional rights, since the failure to predict a change cannot realistically be deterred. The state court has done all that can fairly be asked of it by properly applying the law as it stood during the trial and appeal.

The desirability of limiting habeas corpus to claims based on law existing at the time a conviction becomes final depends on how one distinguishes between "misreading existing law" and "making new law." These categories blend together, yet this blurred line determines the scope of the state courts' duty to faithfully interpret and enforce the Constitution. There will often be sufficient uncertainty about the implications of particular Supreme Court decisions to insulate some state interpretations from federal habeas corpus review under Teague and Penry. Enough ambiguity will remain to insulate some state decisions from federal habeas corpus review.

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[62] 109 S. Ct. at 1075, O'Connor, J. (plurality opinion), 1080, Stevens, J., joined by Blackmun, J.

[63] 109 S. Ct. at 1070, O'Connor, J. (plurality opinion); 109 S. Ct. 2944.

[64] 109 S. Ct. at 1075-77 (plurality opinion).

[65] 28 U.S. C. Sec. 2254(d).

Therefore, we suggest that Congress direct federal courts to hear a habeas corpus petition only if it presents a claim that was either controlled or "clearly foreshadowed" by existing Supreme Court precedent. This standard should require state courts to attend to case law developments without penalizing them for failing to be prescient. At the same time, we believe that this standard will not be too difficult to administer. Its precise contours will require further development through adjudication.

Second, it will often be difficult to separate the retroactivity issue from the merits. In addition, because the pleadings in habeas corpus cases are usually prepared by the inmate, they often require considerable interpretation by the reviewing court; issues that have been formulated cleanly when the case reaches the Supreme Court were seldom so in the lower courts. Therefore, we recommend that the decision whether to address the merits be left to the court's discretion. Exercising of this discretion should depend on whether the merits can be separated from the retroactivity question.

Finally, we agree with the two exceptions recognized in Teague and Penry, but we believe that Congress should create a third exception as well. Some claims are unlikely to be raised on direct appeal (e.g., ineffective assistance of counsel claims and claims that turn on facts that are discovered after appeal, such as Brady claims). After Teague and Penry, however, such claims can no longer be raised in habeas corpus proceedings if they argue for a change in the law. An exception to the rule of retroactivity is thus needed here for the same reason the Supreme Court has recognized an exception to the mootness doctrine for claims that are "capable of repetition yet evading review."

2. Sentencing Guidelines

Introduction

In adopting the Sentencing Reform Act which authorized the promulgation of the Sentencing Guidelines, Congress sought to reduce unjustified sentencing disparity while retaining sufficient latitude to adjust to special factors in individual cases. The Guidelines have produced fundamental changes in the way criminal cases are handled in the federal courts.

In preparation for this report the Committee surveyed all district judges. The Committee was also given access to draft copies of the first two empirical studies on the implementation of the Guidelines. The Administrative Office provided data on appellate caseloads. Finally, the Federal Judicial Center provided information from its ongoing time study in the federal district courts.

As described more fully in our supporting memorandum, the Sentencing Guidelines have significantly increased the federal courts' workload. First, the Guidelines have increased the time necessary for the sentencing hearing. Ninety percent of the judges stated that the Guidelines have made sentencing more time-consuming. Over half said that the time required had increased at least 25%, and 30% of the judges reported that the time spent had increased at least 50%. The time necessary for the hearing at which guilty pleas are taken has also increased. Approximately 75% of the judges stated that the time for these hearings had increased, and more than a quarter stated that the time necessary had increased by 25 to 100%.

Even more importantly, the Guidelines have cast serious doubt on the continued ability of the federal courts to resolve a high percentage of criminal cases without trial. Most of the criminal caseload -- like the civil caseload -- is terminated by settlement, not trial; and the Federal Rules of Criminal Procedure acknowledge the legitimacy of plea bargaining, subject to judicial oversight. The Guidelines are disrupting the plea negotiation process. More than 70% of the judges surveyed stated that the Guidelines had reduced the incentives that may be provided to induce a defendant to plead guilty, and half stated that the Guidelines had decreased the percentage of guilty pleas in their current criminal caseload. This figure is highly significant because the federal system is so heavily dependent on plea bargaining. Traditionally 85-90% of the convictions are the result of guilty pleas, most of which are part of a plea bargain. The empirical studies confirm that the Guidelines are in fact hindering plea bargaining.

How can this picture be reconciled with the data provided by the Sentencing Commission, which has stated that the system is working well, achieving a high rate of compliance as well as a 90.2% guilty plea rate for this first 17 months that the Guidelines were in effect? The empirical studies provide a disturbing answer: bargaining is being forced outside the system. Prosecutors and defense counsel are evading and manipulating the system to induce the pleas necessary to keep the system afloat. Discretion is still being exercised, but it is invisible and no longer subject to judicial review.

The proposals that follow are intended to ensure that the federal courts can continue to process their criminal caseload with the available resources while still adhering to the central principles of the Sentencing Reform Act: the establishment of sentencing guidelines or ranges to guide the exercise and review of judicial discretion in order to avoid unwarranted sentence disparities, the requirement that the sentencing judge explain on the record the reason for the sentence and for any deviation from the applicable guidelines, and the authorization of appeals of sentences by both the defendant and the government.

- **Congress should amend the Sentencing Reform Act to state clearly that the Guidelines promulgated by the Sentencing Commission are general standards regarding the appropriate sentence in the typical case, not compulsory rules. Although the Guidelines should identify the presumptive sentence, the trial judge should have general authority to select a sentence outside the range prescribed by the Guidelines, subject to appellate review for abuse of discretion. The exercise of this discretion may be based upon factors such as an appropriate plea bargain or the defendant's personal characteristics and history.**

A degree of flexibility in the federal sentencing system is necessary to acknowledge real differences between cases and to process the burgeoning criminal caseload with the resources at hand. As implemented, the Guidelines promulgated by the Sentencing Commission ("Guidelines") do not provide sufficient flexibility. They unduly tie the hands of both prosecutors and sentencing judges in a manner that not only causes injustices in individual cases but actually threatens the federal courts' ability to process their cases without a huge infusion of resources to take many more cases to trial.

The Guidelines as implemented do not give the sentencing judge clear authority to adjust the sentence in the individual case in light of all pertinent factors. For example, the Guidelines do not authorize the court to adjust the sentence in light of the defendant's personal history. Yet, it works an injustice to give the same sentence to two defendants, each of whom drives cocaine across the border, when one defendant is a 19 year-old gang member, and the other a 39 year-old father of three whose minimum wage job does not provide health insurance covering the expensive care required for his premature infant. Another area where judges need greater leeway is in cases where the defendant pleads guilty. Despite the importance of plea bargaining in the federal system -- where 85-90% of the convictions traditionally result from guilty pleas -- the Guidelines do not clearly state whether the judge has the authority to approve a sentence outside the Guidelines in accepting a plea bargain.

The Guidelines also tie the hands of the prosecutor by limiting the concessions that can be offered to induce guilty pleas.

The Guidelines make no provision for modifying a sentence because of caseload pressures in a particular district of factual or legal weaknesses in the government's case, all of which affect the prosecutor's willingness and ability to take a case to trial. Furthermore, the Guidelines regarding the defendant's acceptance of responsibility and provision of substantial assistance to the government neither individually nor collectively meet this need.

The third flaw in the system is an outgrowth of the first two. Instead of achieving the Congressional purpose of limiting and regulating sentencing discretion, the Guidelines have actually had the perverse effect of transferring discretion from the court to the prosecutor, who then exercises the discretion outside the system. The Guidelines have limited federal prosecutors' formal authority to offer concessions, but provided no additional resources to take more cases to trial. The rapid increase in the caseload compounds the problem. It appears that some prosecutors (and some defense counsel), in turn, have responded by evading and manipulating the Guidelines in order to induce the pleas necessary to keep the system afloat. These practices occur regularly, despite the fact that many of them contravene the Attorney General's instructions to federal prosecutors, which state that departures from the Guidelines "should be openly identified rather than hidden between the lines of a plea agreement."

The Committee's survey of district judges supports these observations. The responses indicate that greater flexibility is needed to allow courts to tailor sentences in individual cases, and that the reduction in sentencing concessions has made it more difficult to negotiate guilty pleas.

It is crucial to provide the flexibility necessary to induce guilty pleas in appropriate cases. If the rate of plea bargaining decreases, the judicial system will require a huge increase in resources. Since nearly 85-90% of the convictions normally result from guilty pleas, only 10-15% go to trial; even a 5% reduction in guilty pleas would mean a 33-50% increase in the number of trials. This would require large expenditures for additional judges, court personnel, prosecutors, federal defenders, jurors, etc.

On the other hand, it is also important to subject the sentencing concessions in guilty plea cases to judicial oversight under the framework of the Guidelines and the Federal Rules of Criminal Procedure. The present system forces most of this discretion outside the Guidelines, where it is invisible and unreviewable.

The best solution is to amend the statute to clarify the latitude available to the sentencing court. The court should have clear statutory authority to consider a plea agreement in light of the sentence prescribed under the Guidelines and to accept the agreement if the concessions are appropriate under the circumstances. This change would make it possible for prosecutors to follow the Attorney General's directive to reveal openly the proposed departure from the Guidelines, but still offer appropriate inducements to encourage a sufficient number of plea agreements to process the caseload with available resources. The statute should make it clear that the court has discretion to accept an appropriate plea agreement specifying a sentence under Fed. R. Crim. P. 11(e)(1)(C), as well as appropriate agreements under 11(e)(1)(A) and (B). The statute should also give the court latitude to consider other factors, particularly the defendant's personal history. Finally, it is desirable for the courts to have greater leeway to deal with special problems that occasionally arise under particular Guidelines provisions.

The Committee is not seeking a return to the old regime of standardless and unreviewable sentencing discretion, which was criticized for producing unjustified disparity. The Guidelines calculation would establish the heartland -- the sentence for the usual case -- and the sentencing judge would have to state reasons in any case in which he or she deviated from that standard. Any sentence outside the Guidelines would be subject to appellate review for abuse of discretion, with the Guidelines providing the appellate court with a benchmark against which to review the sentence.

Indeed, a review of the literature reveals that some commentators take the view that the discretion we believe to be so crucial is already present in the statute and the Guidelines, though this fact has not generally been recognized by the courts and the litigants.[66] If these commentators are correct, and the amendment we propose will not alter the substance of the law, it is still needed for purposes of clarification.

- **Congress should repeal the mandatory minimum sentences now in effect and direct the Sentencing Commission to reconsider the Guidelines applicable to the affected offenses.**

Mandatory minimum sentences are intended to control sentencing discretion. Although they perform this function, they do so in a way that is far more rigid than the present Guidelines system, which controls discretion but also tailors sentences to the specific facts of an offense, considering whether a weapon was used, whether the defendant was the instigator and leader or a follower, the nature of the injury, if any, to the victim, etc. We agree with the recommendation of the Judicial Conference Committee on Criminal Law and Probation Administration that the mandatory minimum sentence statutes should be repealed now that the Guideline system is in place. Mandatory minimum sentence provisions inhibit the efforts of the Sentencing Commission to fashion a comprehensive and rational sentencing system. Indeed, Senator Kennedy, the co-sponsor of the Sentencing Reform Act, has recognized that mandatory minimums are inconsistent with the Guidelines system.[67]

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[66] See, e.g., Breyer, The Federal Sentencing Guidelines and the Key Compromises on Which They Rest, 17 Hofstra L. Rev. 1 (1988) (court may accept plea bargain that rests on sentence outside guidelines limits); Walker, Below-Guidelines Plea Bargains, 2 Fed. Sent. R. 68 (1989) (same); Weinstein, A Trial Judge's First Impression of the Federal Sentencing Guidelines, 52 Alb. L. Rev. 1, 10-12 (1987) (court can depart on the basis of the defendant's personal history).

Moreover, mandatory minimum sentences are seriously impeding the efforts of both prosecutors and judges to handle the growing criminal caseload. When lengthy mandatory minimum sentences are applicable, it is difficult to provide any incentive that will induce a defendant to plead guilty, and this is causing increasingly serious problems in many districts. Courts with heavy criminal caseloads depend upon disposing of 85-90% of the cases without a trial. Many of the district court judges who responded to our survey added comments emphasizing the negative effects of mandatory minimum provisions.

Once the mandatory minimum sentence statutes are repealed, the Sentencing Commission should reconsider the Guidelines applicable to the relevant offenses. At present the Guidelines use the mandatory minimum as the floor for those offenses. Given the huge projected increase in the federal prison population, it is important for the Commission to reassess the appropriate Guidelines for these offenses absent the driving force of the statutory minimums.[68]

- **The Advisory Committee on the Federal Rules of Criminal Procedure should propose amendments to Rule 35(b) to: (a) authorize the district court to correct an error in the sentence on the motion of either party made within 120 days of imposition of sentence, and (b) authorize the district court to amend a sentence based upon newly discovered facts on motion of the defendant within 120 days of imposition of sentence.**

Given the complexity of the Guidelines and the unfamiliarity of both the court and counsel, numerous errors occur in sentencing. Some of these errors are discovered quickly, but there is no clear procedure to remedy the error short of an appeal or habeas action.

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[67] See Mandatory Minimum Sentences in the Omnibus Drug Bill, 1 Fed. Sent. R. 350 et seq. (1989) (reprinting statements from the Congressional Record).

[68] See generally. Resolution of the Judicial Conference Committee on Criminal Law and Probation Administration, adopted at its meeting June 21-23, 1989.

We believe the district court should have the authority to correct sentencing errors if they are discovered promptly. It is not desirable to require the parties to take an appeal or to bring a habeas action.

The second portion of this proposal may present more problems and will require careful limitation to prevent abuse. On balance, however, it is our recommendation that authority should be available to amend a sentence based upon new factual information provided by the defendant. To guard against abuse, this authority should be limited to information that was not known to the defendant at the time of sentencing. A defendant's acceptance of responsibility (see Guidelines 3E1.1) after sentence would not qualify as a basis for a reduction under this provision. It would also be desirable for the Advisory Committee's notes to emphasize the narrow construction envisioned for this provision.

Given the need for finality, both proposals should be limited to motions made within 120 days after sentencing. Indeed, in light of the need for finality the Advisory Committee might wish to consider whether to state the time period within which a ruling on these motions should be made.

- **The Advisory Committee on the Rules of Criminal Procedure should propose an amendment to Rule 32(c)(3)(D) stating that the district court has the authority to determine before or during the sentencing hearing that it will not be necessary to resolve a disputed factual matter that is arguably relevant to sentencing.**

This amendment could substantially shorten sentencing hearings in many cases. At present, the district judge and counsel not infrequently find themselves involved in lengthy hearings on points that are technically relevant under the Guidelines analysis, but which the court recognizes will not affect the sentence. For example, although prior criminal history is relevant, the court may conclude that the validity of one of many prior convictions will not affect the sentence. Similarly, even if the court has discretion to consider the defendant's personal history, the court may feel that it is not necessary to determine whether the defendant in fact qualified for his GED certificate.

The sentencing court should be given explicit authority to avoid conducting a hearing on such issues. Rule 32(c)(3)(D) presently suggests that authority of this nature exists when the parties allege that there are factual inaccuracies in the presentence report. This authority should be made explicit.

Rulings of this nature could be made subject to appellate review to ensure that they are restricted to the limited purpose envisioned here.

- **The Advisory Committee on the Federal Rules of Criminal Procedure should propose an amendment to Rule 32 requiring the sentencing judge to advise the parties of the Guidelines range under consideration and whether the court is considering departure prior to or at the start of the sentencing hearing.**

Requiring the court to advise the parties of a tentative position would serve two valuable functions. First, it would provide notice to the defendant, which some courts have already concluded is required under the due process clause. Adopting this procedure would eliminate further constitutional litigation on this point. Second, requiring the court to state its tentative position may shorten the sentencing hearing by focusing the parties' presentations.

- **Congress should authorize rotating special appellate panels composed of two district judges and one appellate judge in each circuit to hear appeals raising _only_ sentencing issues.**

The Sentencing Guidelines are imposing a substantial new burden on the courts of appeals a time when the courts' resources are stretched to the breaking point. Statistics provided by the Administrative Office of the United States Courts reveal that for the year ending June 30, 1989, 83% of post-Guidelines criminal appeals raised a sentencing issue. A significant portion of those cases -- 32% -- raised _only_ a sentencing issue. Most of those were probably guilty plea cases that would not have been subject to appeal before the adoption of the Guidelines.

The proposed panels would ease the burden on the courts of appeals and allow the district judges, who are the most familiar with the new Guidelines, to help shape the precedents interpreting and applying them. The presence of one circuit judge should be enough to ensure continuity and liaison with the court of appeals. Although this proposal will require district judges to perform a new function, the task will be so widely shared that the burden on individual judges will not be too great.

- **Congress and the Sentencing Commission should reevaluate the process by which new Guidelines and amendments to Guidelines become law.**

At present, pursuant to 28 U.S.C. § 994(p), Guidelines promulgated by the Sentencing Commission automatically become effective 180 days after submission to Congress. The current scheme is parallel to that used for amendments to the Federal Rules of Civil and Criminal Procedure.

The Sentencing Commission's exercise of its authority to promulgate amendments has recently been criticized both by a member of the Commission itself and by its special counsel. Former Commissioner Michael K. Block has written that some of the changes submitted to Congress in May 1989 were not supported by an adequate empirical analysis, and "that the Commission's process for generating Guideline amendments is developing in such a way as to hinder rational policy making."[69] Commissioner Block argues that the increase in the fraud Guidelines levels was based on no more than the Commission's erroneous belief that other statutory changes had sent a signal to the Commission to increase the penalties for fraud. Special Counsel to the Sentencing Commission Ronald Weich has expressed concern that the emergency amendment procedures are especially susceptible to political pressure.[70]

Whatever the merits of recent amendments proposed by the Sentencing Commission, Congress and the Commission should reevaluate the process by which new Guidelines and amendments become law. Given the extraordinary impact that the Guidelines have upon both the federal court system and individual defendants, one question that should be explored is whether positive Congressional action should be necessary before a new Guideline or an amendment becomes law.

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69. Block, Emerging Problems in the Sentencing Commission's Approach to Guideline Amendments, 1 Fed. Sent. R. 451 (1989).

70. Weich, Emergency Amendments, 2 Fed. Sent. R. 71 (1989).

3. Pendant Party Jurisdiction

- Congress should authorize the federal courts to assert pendent jurisdiction over parties without an independent federal jurisdictional base but with claims related to the same "transaction or occurrence."

Last Term, in Finley v. United States,[71] the Supreme Court limited the federal courts' power to hear pendent party claims. Moreover, the Court's holding -- that express statutory authority is required for a federal court to exercise jurisdiction over parties with only state-law claims-- can be argued to extend beyond the facts of Finley to preclude any exercise of pendent party jurisdiction. Admittedly, reducing pendent-party jurisdiction will decrease the federal caseload - most certainly a goal of this Committee's work - but the Committee believes that caseload reduction brought about through this method is undesirable. Eliminating pendent-party jurisdiction will remove a random selection of claims from the federal court with no consideration for the need or desirability for federal jurisdiction. If there is to be docket reduction, it should be based on an evaluation of which claims are least appropriate for resolution in federal courts; the fortuity of being coupled with a state law claim does not reflect such concerns.

Thus, under Finley, absent a congressional grant of pendent-party jurisdiction to the federal courts, a litigant must choose between (1) splitting his claims and bringing duplicative actions in state and federal courts; (2) abandoning one of his claims altogether; or (3) filing the entire case in the state court, thus delegating the determination of federal issues to the state courts. The first alternative wastes judicial resources. The second alternative is unfair to the litigants. The third forces litigants to bring a wide variety of federal claims into the state courts.

Accordingly, the Committee recommends that Congress overrule the Finley decision by codifying earlier case law respecting pendent claim jurisdiction and explicitly broadening its application to permit exercise of pendent-party jurisdiction under similar circumstances.[72] Congress should authorize federal courts to hear any claim arising out of the same "transaction or occurrence" as a claim within federal jurisdiction, including claims that require the joinder of additional parties. In order to minimize friction between state and federal courts, however, Congress should direct federal courts to dismiss state claims if these claims predominate or if they present novel or complex questions of state law.

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[71] 109 S. Ct. 2003 (1989).

[72] United Mine Workers v. Gibbs, 383 U.S. 715 (1970).

This recommendation may be affected by amendments to the civil RICO statute which as been used in some instances as a device to bring predominately state issues into the federal courts.

4. Elimination of Unnecessary Litigation Through Statutory, Rule and Practice Measures

(a) Statutues of Limitations for Federal Claims

- **Congress should (1) adopt limitations periods for major congressionally-created federal claims that presently lack such periods, and (2) adopt fallback limitations periods for federal claims (such as those implied by the courts) not explicitly created by Congress and for any other federal claim not specifically covered by a limitations provision. Before the adoption of such legislation, existing federal statutes of limitations should be surveyed for any guidance they may provide as to lengths of periods for various types of actions, and to determine whether existing limitations provisions are inconsistent enough to warrant revision.**

At present, the federal courts "borrow" the most analogous state law limitations period for federal claims lacking limitations periods. This approach imposes undesirable burdens on the federal courts for several reasons. The borrowing process can be difficult for judges and lawyers because often it is unclear which state law claim is most analogous. The absence of clear answers to borrowing questions imposes uncertainty on litigants, and reliance on varying state laws results in undesirable variance among the federal courts. It also disrupts the development of federal doctrine on the tolling of limitations periods.

Borrowing, while defensible as a decisional approach in the absence of legislation, appears to lack defenders or persuasive support as a matter of policy. Uniformity of the limitations period between related state and federal claims, which the present regime may provide, is a relatively minor benefit, especially given the uncertainty surrounding which limitations period will be held analogous and governing and the possibility of filing in different states that may apply different limitations periods. The New York State Bar Association recently has endorsed adoption of federal limitations periods. Although some difficulty might arise in fashioning a fair set of limitations periods, the Committee nonetheless recommends that the effort be made.[73]

(b) Venue

- **Congress should replace the present reference in the general venue statute, 28 U.S.C. § 1391(a), to venue in "the judicial district . . . in which the claim arose," with "any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." If Congress should retain diversity jurisdiction, it should also eliminate venue in diversity cases in the district where all plaintiffs reside, thus ending anomalous dissimilarity in treatment between federal question and diversity cases.**

The present general venue statute includes "*the* judicial district . . . in which the claim arose" (emphasis added) as one basis of venue in federal civil actions. The implication that there can be only one such district is "inevitably litigation-breeding," 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure 3806, at 45 (2d ed. 1986), concerning *which* of the possibly several district involved in a multi-forum transaction is *the* one "in which the claim arose." The present language comes from a 1966 liberalization of the venue statute, but it "would have been . . . better still . . . to have followed the lead of the American Law Institute," *id.* at 46-47, which in its Study of the Division of Jurisdiction Between State and Federal Courts (1969) recommended the exact language used in the black letter proposal above. Congress itself used this same phrasing in a 1976 amendment concerning venue in actions against foreign states, 28 U.S.C. § 1391(f)(1). The Supreme Court's principal interpretation of the "in which the claim arose" clause, in Leroy v. Great Western United Corp., 443 U.S. 1973 (1979), has lead to complex approaches and inconsistent rulings in the lower federal courts.

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[73] The Committee does *not* recommend abandonment of the sometimes troublesome fraudulent concealment doctrine, which plaintiffs can use to argue for effective extension of the limitations period. Basic fairness argues strongly against rewarding wrongdoers who succeed in concealing their misdeeds long enough, and the difficulties of making out a case of fraudulent concealment may protect against widespread abuse.

If Congress revisits the general venue statute, it should also eliminate the century-old anomaly providing for venue in diversity but not federal question cases "in the judicial district where all plaintiffs . . . reside." No good historical or functional reason appears to exist for this distinction which perversely favors home-state plaintiffs in diversity cases.[74] The ALI Study, supra, proposed the elimination of plaintiffs' residence as a basis for venue and a provision for venue in a judicial district wherein "any defendant resides, if all defendants reside in the same State."

(c) Separate-Claim Removal

- **If Congress retains the general diversity of citizenship jurisdiction, it should repeal 28 U.S.C. § 1441(c) concerning removal of separate and independent claims.**

Section 1441(c) of the Judicial Code permits removal of a "separate and independent claim or cause of action" that would have been "removable if sued upon alone" when "joined with one or more otherwise non-removable claims or causes of action." A principal purpose of this troublesome provision is to keep a defendant's right of removal to federal court alive when a state court plaintiff joins an unrelated, non-removable claim. Most commonly, such situations arise in diversity cases when the separate claim is against another, nondiverse party. (In the small number of federal question cases in which the statute might apply, it can work fairly well as a backstop to the general removal provisions, 1441(a) - (b) -- hence the conditional nature of the proposal.)

For complex reasons, however, the statute as a paradigm of a failed procedural provision, occasioning much litigation apart from the merits as defendants try and mostly fail to qualify for separate-claim removal. As one court has said of 1441(c), this field "luxuriates in a riotous uncertainty." The ratio of successful uses of the provision to defeated attempts, often after complex argument in federal district or even appellate court before remand to state court, appears to be distressingly low. "[T]he statute's utility is greatly outweighed by the confusion it has engendered." C. Wright, The Law of Federal Courts 39, at 225 (4th ed. 1983).

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[74] See C. Wright, The Law of Federal Courts 42, at 240-41 (4th ed. 1983).

(d) Confidentiality of Discovery Materials

- **Federal courts should continue to use protective orders to preserve the confidentiality of sensitive materials in order to expedite discovery. In order to avoid duplicative discovery, however, courts that enter such orders should freely modify them to permit access to discovered information by litigants in other cases unless such information would not be discoverable in those cases. Access for other litigants to relevant, otherwise discoverable information should be denied only for especially good cause (e.g., protection of confidentiality of settlement discussions or statements made in voluntary alternative dispute resolution proceedings), but may be limited (as by requiring specific requests rather than opening files to later litigants) when all parties to the first litigation oppose access or confidentiality was a condition of settlement.**

Particularly in complex litigation, confidentiality of materials produced through discovery can assume substantial importance. First, when (as is often true) litigation makes inquiry into sensitive materials, assuring confidentiality by using protective orders may facilitate the discovery process by reducing concern for publicity as a possible reason to resist discovery. Second, when the same issues arise in several related cases, sharing of information can make litigation more accurate and less expensive by avoiding need for duplication of effort -- unless defendants feel a need to resist the sharing. In some cases, such as those involving product safety, there is also a public interest in availability of information.

It is not easy to generalize about how to strike appropriate balances in the many different kinds of situations in which there will arise questions of confidentiality of sensitive discovery information that could be of value to other litigants, regulatory authorities, and the public. Denial of general access by protective orders can serve legitimate interests, such as the protection of trade secrets, as well as easing the discovery process. It is, of course, basic that confidentiality orders in one litigation cannot deny to different litigants information that they would otherwise have been able to obtain by regular discovery processes. But there are public as well as private interests in expediting proceedings and settlement; consequently, not all information revealed in the course of one litigation should automatically be open to the public or to other litigants who might find it useful. Such legitimate reasons for confidentiality raise concern about some aspects of H.R. 129, proposed legislation that would limit protective orders in product liability cases; the supporting memorandum by Associate Reporter Marcus discusses the bill and recommends against changing legislatively, for one class of cases, present general practice -- which does often permit access already.[75]

(e) Case Management

- **The Committee encourages (a) the "tracking" of cases by level of complexity, (b) early judicial involvement to control the pace and cost of complex cases, (c) staged discovery, and (d) the training of judges in appropriate techniques of case management.**

Over the past 10 to 15 years, district courts have expedited litigation by taking an increasingly active role in the management of litigation. These efforts were facilitated by the 1983 amendment to Federal Rule of Civil Procedure 16, and should be continued.

More specifically, a recently issued report by a task force of the Brookings Institution and the Foundation for Change extensively studied means of reducing delay and cost in civil litigation. Among the most promising measures identified was "tracking" or "differentiated case management," like that successfully used in New Jersey to classify cases as simple, standard, or complex. Depending on the classification, different time limits for discovery and trial can apply; and complex or hotly contested cases can call for judicial management measures such as early status conferences, targets for completion of various pretrial stages, and close supervision of discovery, including prompt decisions on discovery issues by one judicial officer primarily responsible for discovery matters in the case. Case tracking programs should be so organized that significant decisions remain in the hands of judicial officers and that sufficient flexibility exists to accommodate the needs of individual cases. The growing importance of such judicial case management techniques calls for increased judicial education in the choice and use of such techniques to eliminate unnecessary cost and delay while maintaining judicial impartiality. Given the recent work of the Task Force, the Committee does not attempt to duplicate its work or coverage, but its recommendations deserve careful consideration.[76]

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[75] For a general discussion of this area, see Marcus, Myth and Reality in Protective Order Litigation, 69 Cornell L. Rev. 1 (1983).

(f) Use of Oral Findings and Conclusions in Bench Trials

- **District judges should take advantage of appropriate opportunities to have their findings of fact and conclusions of law in bench trials "stated orally and recorded in open court following the close of the evidence," as authorized by the 1983 amendment to Federal Rule of Civil Procedure 52(a). The Federal Judicial Center should include in its programs for district judges instruction on the use of the parties' proposed findings of fact and conclusions of law.**

Although the objectives of the 1983 amendment to Rule 52(a) were to "lighten the burden on the trial court in preparing findings in nonjury cases" and to "reduce the number of published district court opinions that embrace written findings," too often nonjury cases remain undecided for considerable lengths of time after the end of court hearings. Especially when a case seems unlikely to be appealed, oral findings and conclusions can speed decision making. Greater use of such findings after the close of the evidence can help ensure that decisions are made when the facts and issues are fresh in the judge's mind; furthermore, dialogue with counsel on the spot may sharpen the facts and issues when necessary. In the event of an appeal, these findings or opinions can provide more guidance for the appellate court than the traditional, separately numbered, written findings. Judges could invite proposed findings and conclusions in advance of a decision to be rendered orally.

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[76] Brookings Institution, Justice for All: Reducing Costs and Delay in Civil Litigation (1989); Litan, Speeding Up Civil Justice, 73 Judicature 162 (1989); Bakke & Solomon, Case Differentiation: An Approach to Individualized Case Management, 73 Judicature 17 (1989). Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 Calif. L. Rev. 770 (1981)

The Committee does not recommend the practice of rendering limited oral or written findings to be elaborated on in case of appeal. On balance, the practice seems too likely to complicate losing parties' decision whether to appeal, to encourage needless notices of appeal as a way of getting clearer statements of findings and conclusions, to encumber the appellate process with delays pending filing of Rule 52(a) findings and conclusions after notice of appeal; District judges can, of course, edit and polish recorded oral findings and conclusions to be issued with the formal judgment order. See, e.g., In re Jones, 768 F.2d 923, 931-32 (7th Cir. 1985) (Posner, J., concurring).[77]

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[77] Christensen, A Modest Proposal for Immeasurable Improvement, 64 A.B.A. J. 693 (1978).

III. Internal Improvements in the Judicial Branch

A. Management

1. A CHANCELLOR OF THE U.S. COURTS

- **The Committee endorses the suggestion of the Chief Justice that he appoint a committee in 1990 or 1991 to review the functioning of the current Judicial Conference leadership structure, including consideration of the "Chancellor" concept proposed by the A.B.A.**

The American Bar Association recommends the creation of a position, perhaps held by a federal judge appointed by the Chief Justice, who would function as the administrative head of the judiciary. Sometimes termed for brevity, "chancellor," this official would exercise on a full-time basis many of the powers now exercised by the Chief Justice (and often recently delegated by him to the Chairman of the Executive Committee of the Judicial Conference as well as the Director of the Administrative Office).

The Committee has conferred with the Chief Justice and concurs with his suggestion that the chancellor concept and alternatives be considered by a committee that he will appoint in 1990 or 1991 to review the operations of the Judicial Conference leadership structure as established in 1987. Thus, the Committee feels that it would be premature to make recommendations for further specific changes at this time.

While agreeing that consideration of the Chancellor concept is appropriate, some Committee members believe that a viable alternative to the creation of a chancellor would be the statutory authorization of the new Executive Committee structure within the Judicial Conference. It was suggested that the chair of the Executive Committee could fulfill most of the duties of the chancellor without formally altering the responsibilities of Chief Justice. On the other hand, the pressures of short and long-range planning, testifying before Congress, and leadership in general, may have reached a point where full-time service by a judge, rather than the part-time service of the Executive Committee Chair, is required.

Whether to adopt the Chancellor concept or a different alternative is a matter that will require very careful and extended consideration by knowledgeable persons under the aegis of the Chief Justice.

2. THE JUDICIAL CONFERENCE OF THE UNITED STATES

- **The ability of the Judicial Conference to issue rules and regulations for the federal judiciary should be recognized by statute.**

At present, the Judicial Conference is authorized to oversee the Administrative Office but has no specific grant of power; only the separate circuit councils possess statutory administrative powers.[78] Yet, the Conference frequently and appropriately adopts directives that effectively regulate administrative matters within the federal court system. Because of its statutory oversight of the Administrative Office, and because of the latter's statutory powers, these directives are likely to have implied legal foundation, but some directives could be questioned. The Judicial Conference's rule-making function in the court administration area is deserving of explicit statutory acknowledgement.

3. JUDICIAL COUNCILS

- **The Judicial Conference should determine whether the composition of judicial councils should be prescribed by statute.**
- **Judicial Councils should conduct long-range local planning on administrative matters, especially in light of present trends towards decentralization of budgeting, administration, and space and facilities planning.**

The judicial councils of the circuits are valuable to the administration of the judiciary. Yet, the Committee is concerned about the variations in district judge representation. The Committee therefore encourages the Judicial Conference: (1) to determine whether the composition of judicial councils should be prescribed by statute in a nationally uniform manner, and (2) to work for any necessary statutory changes.

The Committee also wishes to note that long-range planning by the judicial councils, as opposed to reactive planning, is especially desirable in light of present trends towards decentralization of budgeting,[79] administration, and space and facilities planning.[80] The Committee urges a shift in focus (from day-to-day planning to long-range planning) by all judicial councils.

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[78] 28 U.S.C. 332(d)(1).

4. MANAGEMENT STRUCTURE WITHIN INDIVIDUAL COURTS

- The Federal Judicial Center should conduct a study regarding the role of chief judges, the interrelationship between court units, and the assignment of judges. Topics should include:

  (1) The authority to assign judges at specific stations within the district and circuit, and to obtain outside judicial assistance when needed;

  (2) Continuation and possible expansion or contraction of the district executive program, including consideration of the chain of command between the district executive and the clerk; and

  (3) The relationship between the district court clerk/executive and the bankruptcy court, probation office and pretrial service office.

- Courts should have the option to change the title "Clerk of Court" to "District Court Administrator" and future appointments should be made on a competitive basis.

- The current method of chief judge selection by seniority should be continued.

- The Federal Judicial Center's program being developed to provide extensive training to chief judges should be strongly supported with consideration given also to training the chief judge's successor.

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79. See, e.g., the Committee's recommendation on the decentralization of budgeting.

80. See proposal regarding space and facilities planning.

The problems of administration in an era of burgeoning caseload are such that professional staff assistance is a necessity. Creation of the office of circuit executive two decades ago reflected the growing awareness of the need for professional court administration. The ultimate test of professionalism is, of course, performance -- which turns as much or more on dedication, experience and talent as on special training.

Still, the dedicated professional court administrator, skilled in modern management and familiar with the uses of automation, is the key to the efficacy of our courts. No court, in this era, can afford to hire key administrative personnel without a careful search and evaluation process designed to promote, or obtain from outside, the most qualified person. All courts should advertise and open up key administrative positions on a fully competitive basis.

(a) District Executive Program.

A district executive pilot program, patterned loosely after the circuit executive role, has been instituted in eight metropolitan district courts. This program has had mixed reviews. In the nation's largest district court, the Southern District of New York, the office reportedly has worked well. In other locations friction has erupted between the clerks of court and those occupying this new, largely undefined function.

Superimposing a new and undefined function over, or side by side with, an existing function is bound to create a power struggle. It may be that only particularly large courts can support the two separate offices. Much of this problem, we think, can be averted by upgrading existing functions. Clerks should be hired, as is increasingly the case, on the basis of management merit and the ability to handle a broad range of court management functions. In larger courts, the supervision of the clerk's office can be one of several functions that the clerk "administrator" oversees. To accomplish this end, a title change, as discussed below, is desirable to reflect an increased range of responsibility.

(b) Change in the title of "Clerk of the Court" to that of "District Court Administrator."

The title of "clerk" does not adequately convey the multi-faceted management role that is increasingly expected of today's clerks of court. By emphasizing the administrative role of clerks, administrative functions may be enhanced and the friction between competing offices avoided. The change of title should be optional since in some districts the older title may still be preferred.

(c) Training of Chief Judges.

The Committee has examined the method of chief judge selection and has concluded that the current seniority system, while not faultless, operates well in practice. The current method of chief judge selection is preferable to any other under consideration. Seniority of course, does not ensure management ability, but prospective chief judges can, and sometimes should, decline the position or can choose to delegate some responsibility to other judges.

The Committee concurs with the Executive Committee of the Judicial Conference that action should be taken to ensure that chief judges and administrators are well-trained and competent. As courts become increasingly busy, and as programs such as budget decentralization attract more interest, it will become ever more critical to provide able administration. Chief judges need not, and probably should not, be micro-managers. Enlisting the aid of able professional staff and encouraging their colleagues to share in the running of the court is a most important skill. Still, the chief judges' leadership can spell the difference between a successful and an unsuccessful court operation. A well-designed program to train chief judges for their responsibilities should be implemented. We think it would be desirable, too, to provide preparatory training for the successor to the chief judge.

5. ADMINISTRATIVE OFFICE OF THE U.S. COURTS

- **The Administrative Office should continue its studies regarding decentralized budgeting, procurement, and other administrative matters.**

Currently, each court receives a categorized budget, with allocations for personnel, furniture, equipment, etc. Unfortunately, the courts are limited in the ability to transfer among the categories as their needs dictate. If the budget were decentralized, however, the district courts and courts of appeals would have greater authority to determine how to allocate available funds. The Committee believes this greater flexibility is appropriate both to meet the changing or unique circumstances of the local courts and, accordingly, urges the Administrative Office to allow each court a voice in establishing its own budgetary priorities.

- **The Administrative Office should encourage greater understanding and flexibility by its personnel respecting local court operations and viewpoints.**

As with most organizations, from time to time tensions arise between field and central administrators. However, since a committee of the Judicial Conference is charged with oversight of the Administrative Office, and since the Judicial Conference itself has ample statutory authority to correct such problems, the Committee chose not to become involved in this matter. We do, however, encourage greater understanding and flexibility among the parties involved.

The Committee wishes to commend the current administration of the Administrative Office, including its director, for the many positive changes of recent years.

- **The Administrative Office should establish regional offices.**

As with budget decentralization, the regionalization of administrative and training functions now being performed in Washington, D.C., has become a topic of considerable discussion among judges and court administrators. The expectation is that regionalization will foster an identification with the needs of the individual courts and will thus allow the personnel of the local court and of the Administrative Office to gain a greater understanding of their respective roles. While excessive decentralization is not wise, the current situation encourages the erection of artificial barriers between court personnel and the Administrative Office.

The Committee believes that the emphasis in regionalization should be on providing more effective support services.

- **The Committee recommends that the Chief Justice, with the concurrence of the Judicial Conference, appoint the director and deputy director of the Administrative Office of the U.S. Courts.**

With regard to the appointment of the director and deputy director of the Administrative Office, the Committee believes that the power of appointment should be by the Chief Justice with the concurrence of the Judicial Conference. Currently, the Supreme Court appoints both the director and the deputy director of the Administrative

Office, yet the Court, with the exception of the Chief Justice, is removed from issues of administering the lower courts.[81] In turn, the Administrative Office serves the lower courts and is not responsible for the administration of the Supreme Court (which has its own administrative structure).

6. THE FEDERAL JUDICIAL CENTER

- **Congress should increase funding of continuing legal education for judges and the expansion of the Federal Judicial Center's educational programs.**

One area of Federal Judicial Center work that the Committee views as meriting continued attention is its provision of continuing legal education for judges.[82] Judges, like other professionals, must periodically refresh their educations to stay abreast of the latest developments in the law. This is true with respect to both substantive changes and increasingly important administrative techniques of case management employed to handle heavy caseloads and complex litigation. No other entity is better suited to perform this function than is the Federal Judicial Center.

B. Personnel

1. SENIOR JUDGES

- **Disincentives to senior status service that may cause judges either to accept outside employment or to hold onto active status during their advanced years should not be enacted.**

The Committee stresses the importance of maintaining the incentives that the current senior judge system affords. Few organizations in the nation have devised such a successful method of utilizing retired employees in its work force than has the federal judiciary. The current system allows a judge to retire on senior status, thus permitting his or her position to be filled by a new judge while, at the same time, the mature judge continues to offer service to the courts as a "senior judge." The cost to the taxpayer is little more than what the retired judges' pensions would have cost, and, at the same time, the process opens up positions for incoming judges.

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[81] 28 U.S.C. §601.

[82] In other parts of the report, we have suggested significant new duties for the Federal Judicial Center. See section on Long Range Planning.

Without the senior judge program, more than 80 additional judgeships would be needed at an additional cost of 45 million dollars in order to provide the equivalent service to the public. Far from causing a loss to the taxpayer, the system has been an enormous public benefit; it employs persons who, in most other occupations, would be receiving costly pensions, yet performing no public service.[83]

2. JUDICIAL COMPENSATION

- **The Committee applauds passage of The Omnibus Ethics Reform Act of 1989 (Nov. 18, 1989) and encourages Congress to continue to provide timely and adequate adjustments to maintain the proper relationship between prevailing economic conditions and judicial compensation.**

3. NON-JUDICIAL PERSONNEL

- **Consultants expert in personnel issues and organizational structure should evaluate the ability of the Third Branch to attract and retain a competent support staff.**

In a period of substantially increased workload, the partnership between judges and a dedicated and competent support staff has been of critical importance in maintaining the high standards expected of the federal courts. Yet, in recent years, due to budgetary constraints, the probation and clerks' offices have functioned at only 90% to, at most, 95%, of authorized staffing levels. The Committee is advised that it is becoming increasingly difficult to fill positions requiring technical or technological skills at the entry salary levels allowed under the judicial salary plan. Consequently, a number of critical positions throughout the system remain unfilled.

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[83] The Omnibus Ethic Reform Act of 1989 (November 18, 1989) approved a cost-of-living increase for U.S. judges and justices, as well as a cost-of-living adjustment. In order for senior judges to obtain these increases, however, the senior judge must be certified by the Chief Judge of his or her district or circuit as having met one of three requirements, one being the carrying on an annual basis of a courtroom caseload equivalent to three months of regular duty. This and related changes were designed to offset criticism that a judge who was doing no work would receive the increase. The Committee believes that, sensitively implemented, this change can be incorporated without undermining the system's essential incentive.

In 1987, the Department of Labor warned the nation that a workforce crisis, generated in part by technological change and demographic trends, was imminent.[84] Increasing demands for highly skilled workers, combined with an aging workforce, has already created shortages of skilled workers . . ., shortages that are likely to increase in ensuing years.[85] Naturally, government service, including court support personnel, is and will be affected by growing pressures from the private sector as well as an increasing need for more highly technically trained people in the courts but without concomitant means to attract and retain them. Qualified consultants should be retained to consider among other issues a more rational compensation structure, geographical pay differentials, fringe benefits, and expanded continuing education opportunities for support staff.

The Committee believes these issues must be addressed now in order to strengthen the personnel cadre who manage the courts' work on a day-to-day basis and provide the experience, continuity and institutional memory that sound government requires.

4. MAGISTRATES

- District judges and magistrates should be permitted to remind the parties of the possibilities of consent to civil trials before magistrates.
- The Judicial Conference should conduct an independent, in-depth study of the statutory and constitutional jurisdiction of magistrates that (1) defines the constitutional perimeters of the

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[84] Workforce 2000, Work and Workers for the Twenty-first Century, The Hudson Institute (U.S. Government Printing Office)(June 1987).

[85] Id.

> **use of magistrates; and (2) catalogs the statutory jurisdiction of magistrates with a description of the presumption of validity and standard of review by the district court. The study should be conducted with the cooperation and assistance of a broad range of persons interested in the magistrates system.**

The federal magistrates system plays a vital role in the work of the district courts. While each federal court employs magistrates in different ways, their existence helps keep the system afloat. A magistrate's duties[86] include initial proceedings in criminal cases, pre-trial matters referred by judges, and trials of misdemeanors, petty offenses, and the trial of civil cases upon the consent of the parties and the reference of the judge.

The Committee received many proposals about the role that magistrates ideally should perform.[87] Some magistrates believe that they are under-utilized and, hence, desire more diversity in the work they are assigned by the district court (some courts assign the magistrates little more than social security and prisoner cases for review). To this end, some magistrates propose statutory changes that would, in effect, bestow on them more judicial duties. For example, they wish to be given the authority to handle dispositive motions in civil cases and to be routinely assigned civil cases for all or virtually all, with a 30-day period for the parties to opt for a district judge in lieu of a magistrate. And there are numerous fine-tuning proposals; for example, it was suggested that a statutory change should be effected that would allow consent in petty offenses case to be made orally before the magistrate in open court rather than in writing.

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[86] In general, the jurisdiction of a magistrate is that of the district court, but delegated to the magistrate by the district court judge, under statutory authorization. 28 U.S.C. 631(a).

[87] Recommendations were received from the following sources: (1) testimony at the Committee's public hearings; (2) letters from magistrates and district judges; (3) a report from the National Council of United States Magistrates (the NCUSM is an independent, voluntary organization of full-time, part-time and retired U.S. Magistrates); (4) a report entitled The Federal Magistrates System prepared by the Division of Magistrates' Administrative Office of the United States Courts; and (5) a report from the Judicial Conference Committee on the Administration of the Federal Magistrates System.

The Committee encourages the adoption of procedures that will make efficient and appropriate utilization of magistrates. However, as was stated in a report on this subject by the Administrative Office, we must also recognize the need to "safeguard against undermining the institutional 'supplementary' role of magistrates [and the] unintentional creation of a lower-tiered judicial office with separate and distinct responsibilities."[88] The district courts clearly need the assistance of the magistrates in order for the judges to focus on those matters that require Article III attention. If, in fact, the magistrates become a second-tier judicial office, the magistrates will no longer be able to assist the district court judges.

Hence, the role of the magistrate must continue to be supportive and flexible. By the same token, we wish to encourage appropriate utilization. To that end, the Committee makes the following two proposals:

On the district court level, the task today (and for the next twenty-five years) is to make efficient and appropriate utilization of Article III judges, Article I judges, the magistrates, and the community and court resources in order to resolve disputes. In civil cases in particular, the courts must be creative in using available resources to resolve disputes. Court-annexed arbitration, lawyer mediation, mini-trials, appointment of special masters, use of magistrates to assist in civil cases and to conduct settlement conferences, and consent trials before magistrates are all vehicles that the courts will turn to with increasing frequency to keep current with the civil caseload.

In light of the above, the courts should be allowed to encourage consent to trial before magistrates. In that vein, 28 U.S.C. 636(c)(2) is too restrictive. It provides:

> [I]f a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of the court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. . . . Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to

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[88] The Federal Magistrates System, supra at 16.

> consent to reference of any civil matter to a magistrate. (Emphasis supplied.)

Our recommendation is that the italicized language above be deleted and replaced with the following:

> **Thereafter either the district judge or the magistrate may again advise the parties of that right but, in so doing, shall also advise the parties that they are free to withhold consent without fear of adverse substantive consequences.**

In order to alleviate practitioners' concerns that some judges might force trial before magistrates, Congress in its legislative history should note that both magistrates and judges should be sensitive to the rights of the parties to have their disputes resolved by Article III judges.

Some district courts have been reluctant to expand the role of magistrates because confusion exists regarding the magistrates' constitutional and statutory authority. Two recent Supreme Court decisions, *Northern Pipeline Construction Co. v. Marathon Pipeline*, 458 U.S. 50 (1982), and *Granfinanciera v. Nordberg*, 109 S. Ct. 2782 (1989), raise serious questions about what matters may be handled by non-Article III judicial officers. Although these cases both deal with bankruptcy issues, the Article III discussions are, we think, equally applicable to the magistrates, in general.[89]

Accordingly, the Judicial Conference of the United States should conduct an in-depth study of the constitutional perimeters of magistrate utilization. The study should also analyze the future role of magistrates and propose principles for defining the proper limits of that role. This study should include all cases and statutes other than 28 U.S.C.

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89. Furthermore, the recent Supreme Court decision of *Gomez v. United States*, 109 S. Ct. 2237 (1989), raises questions about the statutory duties that a magistrate may properly perform. In Gomez, the Supreme Court held that the "additional duties" provision of 28 U.S.C. 636(b)(3) would not allow a magistrate to preside over the selection of a jury in a felony trial without the defendant's consent. The Court looked, in part, to the legislative history of the Federal Magistrates Act to determine what type of duties a magistrate may perform. District judges would benefit from the publication of an analysis of the legislative history of The Federal Magistrates Act with a list of those duties which bear "some relation to the specified duties" as *Gomez* dictates. Id. at 2441.

636 that discuss the duties that magistrates can perform so that the district court will have a full compilation of the magistrate's statutory authority.

Furthermore, a discussion regarding the standard of review by the district court should be included. De novo review can be so time-consuming and costly for both court and litigants that in many cases referral of a matter ultimately requiring de novo review may be inefficient. On the other hand, if a magistrate's ruling is subject to the clearly erroneous or abuse of discretion standards, then reference of a matter to a magistrate would be more efficient.

The proposed study should be sent to all district court judges so that these courts can use the study to implement ideas to maximize utilization of the magistrates according to the needs of the court. Furthermore, the Judicial Conference of the United States should determine whether statutory amendments should be proposed to give the magistrates such authority as is necessary to provide the requisite support to the district court.

5. PROBATION SERVICES

- **The post-conviction supervision of persons on probation, parole and supervised release should not be moved from the Judicial Branch to the Executive Branch.**

The probation office in each judicial district has two functions: (1) pretrial investigation, and (2) post-conviction supervision of persons on probation, parole, and supervised release. Although it is generally agreed that the pretrial investigative function should remain within the Judicial Branch, it has been suggested that the function of post-conviction supervision be transferred to the Executive Branch because that work is similar to other correctional functions now performed within that branch. The Committee, however, disagrees and recommends that the post-conviction supervision of persons on probation, parole and supervised release, remain in the Judicial Branch.

The probation service presently functions well, and furthermore, that its position within the judiciary enhances its effectiveness. The current dual function of the probation offices offers two advantages. First, the probation officers can move freely between investigation and post-conviction supervision; many take advantage of this opportunity. In some offices, for example, probation officers typically begin working in pretrial investigation where they become familiar with the federal criminal justice system. After gaining experience, many choose to shift to work involving post-conviction supervision. The flexibility and variety offered by the dual function of the federal probation offices has been a factor that has helped to attract and retain an excellent staff. Second, the dual function of each office makes it easy to use information gathered during the pretrial investigation for purposes of post-conviction supervision as well.

The employees of the probation service are well qualified, experienced, and highly trained. They elected to work for an agency located within the Judicial Branch; many may object to being transferred to the Executive Branch. Transferring the probation service's post-conviction functions to the Executive Branch may also tend to centralize what is now a highly decentralized system of offices in each judicial district; these offices have great familiarity with local conditions and boast the ability to adapt quickly to changed circumstances (such as the availability of additional beds in a particular treatment program). These advantages would be lost if the probation officers involved in post-conviction supervision were transferred to a centralized agency within the Executive Branch.

C. Resources

1. FEDERAL DEFENDER PROGRAM

- With respect to compensation under the CJA, the Committee believes that the establishment of a specific formula is beyond its expertise but recommends that the Judicial Conference propose a formula for the compensation of CJA counsel that will include a an amount to cover reasonable overhead and a reasonable hourly wage.
- Congress should require that the selection of the federal defender in each jurisdiction be done by an independent board or commission formed within the district to be served.
- The Judicial Conference should conduct a comprehensive review of the Criminal Justice Act, including its implementation and its administration.

More than twenty years have passed since the last independent review of the Criminal Justice Act Program ("CJA").[90] Since that time, the federal defender program has grown substantially in size and complexity. For example, panel attorney appointments have risen from 16,000 in 1966 to 65,000 in 1988.

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[90] 18 U.S.C. 3006a (1964).

In view of (1) the great importance of this program and (2) the issues that have arisen concerning the judiciary's role in the establishment and termination of a federal defender organization, the appointment, reappointment, and compensation of federal public defenders and panel attorneys, the Committee recommends that the Judicial Conference appoint a special committee to conduct an in-depth study of the federal defender program. The purpose of the review would be to assess the current effectiveness of the CJA program and to recommend appropriate legislative policy, as well as procedural and operational changes.

In addition to present and former federal defenders, appointees to this study committee should include representatives of the criminal defense bar selected by the National Legal Aid and Defense Association (NLADA), the National Association of Criminal Defense Lawyers (NACDL), and the Criminal Justice Section of the American Bar Association. Because issues of administration, ethics and the public trust and interest are involved, participants sensitive to such perspectives should likewise be appointed.

The Committee recommends that the study committee, when formed, focus on:

(1) The impact of judicial involvement on the selection and compensation of the federal public defenders and on the independence of federal defender organizations, with special emphasis on:

  a. Appointment, reappointment, and compensation of federal public defenders;

  b. Establishment and termination of federal defender organizations;

  c. The federal public defender and the community defender options.

(2) Equal employment and affirmative action inadequacies, particularly as to the directors of the various federal defender programs.

(3) Judicial involvement in the appointment and compensation of panel attorneys and experts.

(4) Inadequacy of compensation for legal services provided under the CJA.[91]

(5) The quality of CJA representation.

(6) Lack of adequate administrative support for defender services programs.

(7) Maximum amount of compensation for attorneys with regard to appeals of *habeas corpus* proceedings.

(8) Contempt, sanctions and malpractice representation of panel attorneys.

(9) Appointment of counsel in multi-defendant cases.

(10) Early appointment of counsel in general, and prior to the pretrial services interview in particular.

(11) The method and source of payment of the fees and expenses of fact witnesses for defendants with limited funds.

(12) The provision of services and/or funds to financially eligible arrested but unconvicted persons for non-custodial transportation and subsistence expenses, including food and lodging, both prior and during judicial proceedings.

Finally, the selection of federal public defenders should be made by independent boards or commissions. Currently, at least five federal defenders in San Diego, Chicago, New York, Philadelphia, and Atlanta are selected by independent boards. These programs are considered by many to be among the best federal defender offices in the nation. In these jurisdictions, the federal judges are spared the time-consuming burdens of selecting the chief defender and of administering the panel attorney system.

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[91] The Committee recommends that the study propose a formula for the compensation of CJA counsel that will include an amount to cover reasonable overhead and a reasonable hourly wage. The notion that CJA representation is or should be a casual pro bono assignment has long since been outmoded. While the Committee does not anticipate that CJA representation will be compensated at the rates charged by leading, retained counsel, the Committee nonetheless believes that representation of indigent defendants should not involve a financial loss to counsel.

Given the maturation of the defender movement, the dramatic increase in criminal prosecutions, the evolving sophistication and complexity of criminal law, the constitutionally mandated necessity of competent defense counsel, the small percentage of the legal profession that practices criminal law, the legal and ethical requirement of an independent criminal defense bar, the heavy workload of the federal judiciary, the independence of the federal prosecutor, and the rebirth of the federal death penalty, it is now essential to ensure the continued development of independence and autonomy within federal defender programs by assuring that the selection of federal public defenders, as well as their retention and termination, will be the responsibility of an independent commission or board.

2. SCIENCE AND TECHNOLOGY IN ADJUDICATION

▸ A comprehensive examination should be made of issues and measures concerning technology and the natural and social sciences in adjudication, including the scope and nature of the problem, the means of using impartial experts, and the advancement of judicial skills and capabilities in the use of scientific, economic, and technological information. In particular, the following steps should be taken:

1. An analysis of the types of scientific issues presented to the courts, their frequency, and the problems they present;

2. The identification of improved procedures for the handling of scientific evidence in the adjudication process, and an evaluation of the pros and cons of using panels of court-appointed experts, science masters, and the like, in various types of cases;

3. The development of procedures (1) to enhance the fairness and accuracy of judicial notice of scientific information and materials; (2) to govern the nomination, designation, utilization, and compensation of court-appointed science experts; and (3) to govern the use of alternative dispute resolution mechanisms for scientific and technological issues; and

4. An evaluation to determine the best methods of improving the ability of judges, magistrates,

and law clerks to handle scientific and technological materials in adjudication.

- **A manual that addresses the courts' consideration of scientific and technological issues should be created.**

The significance of technology and the natural and social sciences in the courtroom is becoming increasingly important, in both routine and complex litigation. The role of science and technology poses several kinds of problems -- of competence of law-trained judges and generalist juries to deal with the information; of workload as the amount and complexity of material to be absorbed increases; and of culture clash as adversarial partisanship confronts the scientific ideal of the disinterested search for truth. Among the long-range tasks the Federal Judicial Center could undertake as a priority matter would be a study of some or all the items enumerated above.

The federal courts' need to deal with complex scientific and technological questions tends to be sporadic, depending on the luck of the draw in litigation. Consequently, we do not propose regular training in the area for all, or even all new, federal judges; it might be untimely or wasted. Rather, federal judges may profit from an available reference source on the types of problems likely to be encountered when such a case arises, much as they do from the Manual for Complex Litigation. Such a manual could be a product of the Federal Judicial Center or of the proposed Office of Judicial Impact Assessment if it undertakes the study recommended above.

3. SPACE AND FACILITIES

- **Congress should permit the judiciary to contract for its own space and facilities (using the G.S.A. and other agencies on a contract basis when appropriate).**

The Committee endorses legislation soon to be introduced in Congress that would transfer responsibility of the courts' facilities from the General Services Administration ("G.S.A.") to the judiciary.[92]

This legislation, developed by the Space and Facilities Committee of the Judicial Conference, is a response to the long history of frustration the courts have experienced in their dealings with the G.S.A. While G.S.A.'s expertise ought to be a resource to be tapped by the courts, allowing that agency to control the courthouse has been problematic from both a philosophical and practical point of view.

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[92] This legislation, entitled The Judicial Space and Facility Management Improvement Act should be introduced in the U.S. Senate in early 1990. The proposed legislation was approved by the Judicial Conference at its September 1989, meeting, and has been carefully drafted with support from the Administrative Office.

Although this legislation, if passed, would increase responsibility for local court administrators, the flexibility and improved efficiency gained should override the new burdens imposed.

4. FEDERAL COURT LIBRARIES

- **Qualified library consultants should conduct a detailed examination of the resources, capabilities and operations of the federal court library program.**

The last detailed study of the federal court library system was conducted in 1978.[93] Yet, between 1978 and 1988, the total number of primary users served by the federal court libraries -- including judicial officers, law clerks and staff attorneys -- doubled from 1,895 to 3,928. Law clerks, the chief users of the libraries, alone increased in number from 849 to 2,107 in the same period. The number of central libraries serving judges and their staff grew from 28 to 70; those libraries presently serve some 1,570 judicial officers located in over 330 cities.

During this ten-year period, the numbers of library support staff have not kept pace. In 1981, a formula was developed by the Judicial Conference to determine the number of library personnel needed to meet the legal research and library services needs of the judiciary. This formula provided one library staff member for every six full-time judicial officers. Until recently, there were over twenty satellite locations serving over six judicial officers without any library staff on site. Additionally, when one moves beyond satellite operations and looks at the entire federal court library system, one discovers that present staff levels are only 80% of the support staff suggested under the 1981 staffing formula.

In terms of automation and information delivery, the federal court library system is ten to fifteen years behind its counterparts in academia and the private sector. Automation efforts require intensive and critical planning prior to systems implementation. As a result of constantly having to address immediate needs (instead of focusing on thoughtful, long-range planning) the federal court libraries are in the precarious position of managing differing data utilizing a variety of software on noncompatible hardware.

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[93] Improving the Federal Court Library System, report and recommendations submitted to the Judicial Conference of the United States by the Board of the Federal Judicial Center, February 1978.

Key long-term planning elements must be identified and research conducted to develop proposals for finding methods to provide adequate library support services to judges, wherever they are, without making an unnecessarily large investment in space, staff and books.

The services provided to the judiciary by the federal court library system are critical to the substantive decisional process. Thus, a detailed examination of the resources, capabilities and operations of the federal courts' library system should be undertaken at the earliest possible time. In view of the growing gap between the Federal courts library program and other public and private sector libraries, such a study should be conducted by qualified library consultants specializing in long range planning and personnel evaluation.

5. BUDGETARY ISSUES

- **Include in the budget for the federal judiciary the budgets of both the Court of International Trade and the Court of Appeals for the Federal Circuit.**

Currently, the Court of International Trade and the Court of Appeals for the Federal Circuit each submit their own budget to the Office of Management and Budget separate from the rest of the judiciary. This special treatment is due to a historical anomaly that is inconsistent with the budgetary process for the other federal courts. The Committee believes it would be more appropriate for the Court of International Trade and the Court of Appeals for the Federal Circuit to participate in the same budgetary process as the rest of the federal judiciary. Hence, we recommend that legislation be enacted to correct this anomaly.

6. COURT REPORTERS AND EVOLVING TECHNOLOGIES

- **The Judicial Branch should carefully consider the impact on both courts and litigants at the trial and appellate levels before adopting any technological innovation.**

The Committee recognizes the enormous importance of an excellent court reporting system to the efficient functioning of the rts. Delays in obtaining transcripts are probably the st serious single cause of appellate delay.

The Committee does not have the resources to study and report on the specifics in this rapidly changing area, but it does take note of a number of continuing concerns in this area to the courts, reporters, and litigants. Accordingly, the Committee urges that the federal judiciary and, in particular, the Administrative Office give high priority to ensuring that transcripts are produced in the most efficient and expedient manner possible. The Committee also cautions that resort to a technological innovation, at any level of the federal judiciary, should not occur until the impact of that improvement has been assessed by both the courts and litigators at the trial and appellate levels.

7. UNPUBLISHED OPINIONS

- **A representative ad hoc committee under the auspices of the Judicial Conference should review policy on unpublished court opinions in light of increasing ease and lower cost of database access.**

The policy in several courts of appeals of not publishing certain opinions, and concomitantly restricting their citation, has always been a concession to perceived necessity. Sheer bulk prohibits universal publication in the Federal Reporter, and many opinions are indeed easy applications of established law to fact. Still, nonpublication policies present many problems; and access via electronic databases may sufficiently ease the difficulties of regarding all opinions as "published" and subject to citation to call for reconsideration of existing nonpublication and limited-citation policies.

Researchers have argued that nonpublication policies are inconsistently administered and partially circumvented by regular litigants, who receive and often circulate internally such opinions and then are able to use arguments from them in other cases -- thus defeating one purpose of restrictions on citing them, which is to keep those with better access to unpublished opinions from having an unfair advantage.[94]

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[94] *See generally* D. Stienstra, Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals (1985); Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 Mich. L. Rev. 940 (1989); Songer, Smith & Sheehan, *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 Fla. St. U.L. Rev. 963 (1989); concurring and dissenting (continued...)

Doctrinal reasons also exist for questioning the nonpublication rules on the ground that litigants should be able to argue that they are indeed situated similarly to a party in a previous case, even if the court thought it not significant enough to warrant publication. Universal publication has enough problems of its own that we cannot recommend it now; but inexpensive database access and computerized search techniques may reduce inequality problems enough to warrant revisiting the issue.

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94. (...continued)
statement of Chief Judge Holloway to 1986 revision of Tenth Circuit Rules.

IV. LONG RANGE REFORMS

A. THE APPELLATE CASELOAD CRISIS

- **Congress and the Administration should take immediate steps to address the demonstrated need for additional appellate judgeships.[95] This action should be based on formulae currently in use, as supplemented by the Judicial Conference and its advisors.**
- **The Judicial Conference should, after study, make more precise the caseload formula for determining the judgeship needs of the courts of appeals -- in particular, to take into account the varying types of appeals handled in each court. Congress should provide the necessary resources and funding for this project.**
- **The Administration and Congress should move expeditiously, whenever a judgeship vacancy occurs, to fill such vacancy.**
- **The Judicial Conference should commence an intercircuit study project -- perhaps under the aegis of the Federal Judicial Center -- of the most effective and reliable means of appellate case management, and to devise a way to exchange caseload management information between the courts, so that all courts have available the most current information on caseload management.**

1. The Need for Additional Judges

The Committee is alarmed at the extraordinary growth in the number of filings in the nation's appellate courts. Since 1945, the rate of appeals has risen from one appeal for every forty-two district court terminations, to one appeal for every eight such terminations.[96] As a result, filings in the courts of appeals have risen astronomically by 1,355 percent, or nearly fifteen-fold. Yet, during this same period, the number of appellate judges needed to hear these cases has increased only by a factor of three, from 59 to 156.[97] We estimate that each judge's share of the caseload has multiplied by a factor of nearly six over the same period.

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[95] This short-term recommendation (that Congress create more appellate judgeships) is not inconsistent with the Committee's long-term proposal that Congress and the Judicial Conference investigate other avenues of reform to reduce the workload of the courts before routinely adding to the federal branch.

[96] Flanagan, Appellate Court Caseloads: A statistical Overview (paper prepared for The Subcommittee on Structure) p.1.

Also revealing is the increase in number of case participations per judge. In 1965, each appellate judge, sitting in a panel of three, participated in an average of 136 terminations.[98] By 1989, the average number of participations had risen to 382 per judge (varying from a low of 208 in the D.C. Circuit to a high of 530 in the Eleventh Circuit). Thus, per judge participations by 1989 were almost three times as many as in 1965. Certainly in circuits such as the Fourth, Fifth, Sixth, Eighth and Eleventh, where per judge participations in 1989 were respectively, 497, 461, 479, 420 and 530, there can be no doubt that the caseload per judge is excessive, and in the opinion of the Committee, grossly so.[99]

The Committee's view is fortified by workload figures we have reviewed from the intermediate state appellate courts that indicate that the federal appellate caseload is higher than that of many state appellate courts, even though the responsibilities of the federal circuit judges are greater.

These figures indicate that the number of cases for which each judge is responsible is not only at a record high, but at a level so high that judges of the 1940's and 1950's would have found the workload unmanageable. The figures also demonstrate that, at this moment, in every circuit except for the D.C. Circuit and the Second Circuit, the number of cases in which each judge takes part exceeds the number (255) that the Judicial Conference uses as its standard for determining an appropriate annual work load for each appellate judge.[100] Furthermore, the number is higher than the 225 merits participations per appellate judge that was found to be an appropriate work load by three experts who carefully considered the matter in 1976.[101] In our Committee's poll of circuit judges, most judges responded that a standard of 225-255 merits participations was an acceptable figure as an annual workload standard per judge.

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[97] Id. at Table 5.

[98] The number varied from 85 in the Eighth Circuit to 207 in the Fifth Circuit.

[99] The revised judgeship bill filed on behalf of the Judicial Conference (based on 1987 statistics) requests sixteen new judgeships for the courts of appeals. These numbers doubtlessly will be revised upwards in light of more current (1989) figures. The Court of Appeals for the Eleventh Circuit, although clearly in need of more judges, has declined to request any because of concerns about the lack of collegiality and other problems associated with circuit growth.

This pyramidic growth has and will have a profound impact on the federal courts of appeals: (1) it has increased the caseload per appellate judge; (2) it has increased, and will further increase, the number of judgeships needed; and (3) it has decreased the relative percentage of all appeals that the Supreme Court is able to hear, thus causing an increasing proportion of federal law to be decided, sometimes inconsistently, at the regional appellate level.

To their great credit, the Courts of Appeals have kept abreast of their caseloads so far. This is no small achievement: to accomplish it, judges have had to raise their individual productivity nearly six-fold since 1945. But the means to do this have been largely exhausted. These have included, besides the judges' own efforts, (a) multiplying each judge's law clerks from one to three; (b) utilizing "central" staff (staff attorneys); (c) reducing oral argument times; (d) shifting cases to non-argument tracks; (e) disposing summarily of weaker cases; and (f) other innovations, like settlement programs. While it is vital that the circuits continue to study and utilize the most advanced case-management methods, we fear that further increases in the high ratio of case filings to number of judges must inevitably be at the expense of the quality of the courts' work. The Committee is concerned that, for lack of time, cases that should be heard may not,[102] those that are heard may be decided with insufficient thought, and decisions of precedential importance could be written carelessly. We fear that workload pressures may cause nonwriting judges to acquiesce too readily to the draft of the writing judge, without themselves providing constructive insight and criticism. Overtaxed to this extent, appellate courts could do serious harm not only in rendering ill-advised decisions but in producing ill-considered caselaw. These would be serious defects indeed in a justice system upon which modern society depends not only to decide controversies but also for the interpretation of its laws. This is all the more true since, while the Supreme Court is the ultimate arbiter, it is able to hear only a diminishing percentage of the ever-growing number of important appeals.

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[100] Report on the Judicial Conference Subcommittee on Judicial Statistics to the Committee on Court Administration. July, 1986, pp. 2-4.

[101] Paul D. Carrington, Daniel J. Meador and Maurice Rosenberg, Justice on Appeal (West 1976).

[102] Since 1975, the number of appeals decided nationwide without oral argument has risen from 30 to 50 percent. In two circuits, in particular, 67 percent of all appeals are decided without oral argument. In most courts of appeals, cases submitted on briefs are decided with a reasoned opinion of some type, usually unpublished. However, in three circuits, many unargued appeals are disposed of without stated reasons.

While we emphasize that no breakdown in quality of the type mentioned above has come to our attention, we believe that the productivity of our appellate courts today is at maximum levels. Delay in adding judgeships while the dockets continue to grow could undermine the courts' ability to function properly. Accordingly, we urge Congress to address now the problem of needed judgeships at the appellate level.

2. The Need for a Reliable Caseload Formula for Determining the Judgeship Needs Circuits.

Determining how many judges each court needs is not a simple task. To help gauge present and future judgeship needs, a more sensitive and sophisticated workload index than the inflexible 255 participations rule described above is needed. We believe that Congress and the courts would be well assisted by the development of a better indicator, particularly one that takes into account case types. The mix of cases varies greatly among the circuits. It seems unrealistic to treat social security appeals as requiring the same investment of judicial time as do securities or civil rights appeals. Presently, the only weighting the Judicial Conference undertakes in utilizing the 255 participations per judge index is to treat prisoner petitions as constituting only one-half a case.[103] We think that a weighted formula is preferable to pretending that cases in every category require the same amount of judicial attention. Other indices also may be developed to better determine judgeship needs.

To devise such a formula will require research into the time actually spent by judges in handling particular appeals.

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[103] For some time, however, the Judicial Conference has used a weighted case load index in determining the judgeship needs of the district courts. For a number of reasons the latter formula is not yet entirely satisfactory and is undergoing further study.

Both the formula itself and the research that precedes it will help provide a more reliable means for assessing how many cases a judge can handle.

It has been the hallmark of our judiciary that the judges do much of their own work. While modern methods have properly added more staff assistance to the process, the judge should remain the central decision maker. We must not give appellate judges a caseload so large that they either surrender their decision-making to staff or also decide cases under such pressures so as to be incapable of thoughtful and just decision-making.

The Committee, therefore, emphasizes its belief that the courts of appeals today are, in general, at full capacity, and that many of the circuits stand in immediate need of more judges. Where courts are stretched to their limits and where case load reductions are not realistically a prospect, we know of no responsible course other than the addition of judges. In so urging we do not wish to be seen as precluding further efforts at even more efficient case processing. Such programs as the Supreme Court of Washington's utilization of appellate commissioners are well worth more careful consideration. Nonetheless, no program that we are aware of will preclude the need for a significant increase in the number of judges.

THE COURTS OF APPEALS - STRUCTURAL CONSIDERATIONS

- **Call for Congress, the courts, bar associations and academia to give the problem of appellate structure serious attention over the next five years.**

Within the next five years it should be decided whether to retain the present circuit structure or to adopt a new system. During this period, the Committee hopes that a study and pilot project, as proposed in the following section of this Report, will be undertaken. This study and pilot project should lead to a greater understanding of the nature and extent of the intercircuit conflicts problem, and of mechanisms to help resolve those conflicts. Armed with this knowledge, and with newly-gained experience with larger circuits, a better educated choice can be made whether to keep the present structure, or to devise some other.

(a) Background

The present system of regional circuits was laid out in 1891. Beginning with only three judges, the courts of appeal in each circuit ranged in size by 1950 between three and seven judges (except for the D.C. Circuit, with nine), with an average of under six judges. These courts still continued the practice of sitting in panels of three judges, regardless of overall size. Through the 1950's, all the courts of appeals could be viewed as unitary tribunals. Each court's small size and intimacy made possible the belief that, even though it sat in rotating panels of three, the court was physically a single unit, much like the appellate courts that headed each state.

In the past three decades, however, the number of appellate judges has trebled in response to an appellate caseload that has multiplied nearly fifteen-fold. With caseload continuing to rise, creating additional new judgeship needs, the small unitary court of appeals appears rapidly on the way to obsolescence.

In 1975, the Hruska Commission expressed great concern over the expansion of courts of appeals beyond nine judges each.[104] Its recommendation, that the Fifth and Ninth Circuits be divided, reflected this concern. The Fifth Circuit, accordingly, was divided in 1981. The Ninth Circuit has not been divided and today operates with 28 authorized judgeships. Ironically, only a few years later, both the Fifth and the Eleventh (which was created from the Fifth) Circuits, have caseloads that could soon bring them to 20 or more judges each. The Sixth Circuit Court of Appeals faces a similar situation, as do the Third and Fourth Circuits.

Furthermore, the number of appellate judgeships has risen nationally from 59 judges in 1945 to 156 in 1989. And, the average size of a court of appeals itself has risen from five judges in 1945 to 13 judges in 1989. Thus, while in 1945 every appellate court was a small unitary tribunal not unlike a typical state supreme court, that is clearly no longer true. Today, the authorized court judgeships are as follows: D.C., 12; First, 6; Second, 13; Third, 12; Fourth, 11; Fifth, 16; Sixth, 15; Seventh, 11; Eighth, 10; Ninth, 28; Tenth, 10; Eleventh, 12. Applying the 255 participations formula[105] now in use by the Judicial Conference of the United States to determine new judgeship requirements, the courts theoretically needed 50 additional judges to handle just their 1989 caseload, for a total of 206 judges. If this number of judges were, in fact, realized, the "average" court of appeals today would have 17 judges.[106]

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[104] Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedure: Recommendations for Change, 57-59 (June 1975).

[105] Report of the Judicial Conference Subcommittee on Judicial Statistics to the Committee on Court Administration, July, 1986, pp. 2-4.

The Committee has secured other projections of future judgeship needs utilizing the 255 participations formula. Assuming that appellate caseload rises in the next five years at the same rate that it has from 1960-89 (the most conservative of several projections), a total of 280 judges would be required in 1994, for a per circuit average of 23 judges. (Three courts of appeals would have over 30 judges, and the Ninth, would have 43). This same projection would predict a need for 315 appellate judges in 1999 (26 per court, with the Fifth at 39 and the Ninth at 49), and 392 judges by 2009 (33 per circuit, with the Fifth at 49 and the Ninth at 61 judges).[107]

The burgeoning caseload has thus caused a sharp increase in the number of circuit judges needed nationwide. Many of the courts could reach 20 or more judges within a few years.

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106. Broken down, the judges needed under that standard, based on 1988 statistics, would be as follows: D.C. Circuit, 0; First, 2; Second, 0; Third, 5; Fourth, 8, Fifth, 8, Sixth, 9; Seventh, 1; Eighth, 2; Ninth, 2; Tenth, 3; Eleventh, 10. These numbers are much greater than the 16 judgeships requested by the Judicial Conference in its pending judgeship bill (revised to include the Sixth Circuit's recent request). The number in that bill is derived from lower 1987 statistics. Besides considering the 255 participations formula, the Conference, in drawing up that bill, reviewed other factors affecting the courts of appeals, including the views of the judges. A Conference committee is now in process of drawing up judgeship needs based on 1989 statistics. We note that the judges of the heavily burdened Eleventh Circuit declined to request any new judgeships pending the report of this Committee. The Sixth, on the other hand, after initially voting not to request additional judges, reversed its position in 1989. Other circuits requested fewer judges than the 255 participations rule would allow. The circuits' reluctance to request new judgeships reflects a resistance to further growth. It could also reflect genuine weaknesses in the 255 participations formula, where caseload growth may reflect case types not requiring much judicial time.

107. If the future judgeship increase is projected on the basis of trends from 1970-89 (and not the 225 participations formula), a larger increase occurs: 288 judges are needed by 1994; 332 by 1999; 423 by 2009. Under this projection, the average circuit would need 24 judges within five years; 28 within ten years, and 35 within 20 years. The Fifth would reach 54 judges within 20 years, and the Ninth, 67.

(b) The Hruska Model: Nine Judge Circuits and the Ninth Circuit Experiment

The Committee initially considered adopting the Hruska Commission's goal of maintaining each court at approximately nine judges. We declined to adopt that view for the reasons given below. We think it would be premature to adopt such a goal now, although growth pressures will soon force a decision. There are several reasons for postponing an immediate response:

First, caseload growth has been so great to date that any decision to effect a permanent system of small circuits would involve dividing and reorganizing not only the Ninth, but the Third, Fourth, Fifth, Sixth and Eleventh Circuits. Nor could the present circuits be reduced simply by dividing them. More likely, the present circuits would have to be dissolved, and a new set of circuits devised perhaps with a mechanism for periodically reorganizing them so as to maintain the number of judges in any one circuit below the maximum desired. We are aware of no constitutional bar to this; the lower federal courts have been thoroughly reorganized several times throughout their history. On the other hand, the effort and disruption involved would be staggering. A fundamental change like this should be recommended only if it is clearly the right step. The Committee believes it needs to know more before it can recommend the creation of twenty or more smaller circuits to be the most desirable course for the future.

Second, a system of small circuits is workable only if a mechanism can be devised to handle the problem of intercircuit conflicts. As discussed below, the growth in the number of appeals processed has increased the number of intercircuit conflicts. A shift from thirteen to twenty or more circuits can only exacerbate the problem. As we discuss below, we must learn more about the seriousness of the conflicts problem if we are to deal with it effectively. If the recommendations suggested below are followed, the knowledge and techniques learned regarding intercircuit conflicts might conceivably argue for the subdivision of the appellate judiciary into more circuits using intercircuit panels and various national stare decisis rules to control conflicts.

On the other hand, it may turn out that twenty or more circuits would be more manageable if evolved into the lower tier of a two-tier federal appellate court, with the upper tier comprised of four or five higher tribunals, each with discretionary appellate jurisdiction over four or five circuit courts. Since such a multi-level plan would involve a fundamental structural change in the federal court system, the decision to create many small circuits should be postponed until we are better educated as to what such a step would entail.

Third, the Court of Appeals for the Ninth Circuit's apparent ability to manage effectively with 28 judges gives us pause. Viewing that court as an experiment in the management of a "jumbo" court, we think it worth letting more time pass before definitively concluding larger circuits are, indeed, unworkable. The Ninth Circuit insists that it is managing well.[108] A number of judges agree.

However, a large majority of judges outside the Ninth Circuit (and some within) disagree with the proposition that bigger is better. Three quarters of the circuit judges who responded to the Committee's poll felt that 15 or fewer judges best served the proper and effective functioning of the circuit courts of appeals. Many identify twelve or even nine as the ideal maximum.

The debate between the Ninth Circuit and the more traditional smaller circuits revolves around two very different conceptions of the role of an appellate court. The Ninth Circuit works as a rotating system of three-judge panels (over 3,000 combinations are possible) covering an enormous geographic area, bonded by a very capable administration and serviced by the nation's only small (11 person) en banc. (Its willingness to accept a small en banc -- a mechanism recommended by the Hruska Commission -- may well be a key to its ability to operate, since the impossibility of large court en banc procedures was one of the reasons the old Fifth Circuit agreed to split.) In contrast, other circuits still prefer the traditional concept of a small, unitary court, characterized by intimacy between the judges even as their growing caseload makes this ideal more and more difficult to sustain. Either the Ninth Circuit represents a workable alternative to the traditional model, or the entire present appellate system needs restructuring, since other circuits are inevitably destined for "jumbo" status unless caseload can be curtailed.

For example, Professor Arthur Hellman, who has studied the question of intracircuit conflicts in the Ninth Circuit, reports that the panels of that court have been faithful to stare decisis, and that the en banc has acted effectively when required.[109] He concludes that the Ninth Circuit is not at all torn by intracircuit conflicts.[110] The Court itself insists, in its latest report, that it should be regarded as the harbinger of future appellate courts rather than as an abnormality.

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[108] See Fourth Biennial Report to Congress on the Implementation of Section 6 of the Omnibus Judgeship Act of 1978, submitted by The Judicial Council and The United States Court of Appeals for the Ninth Circuit (July 1989).

We conclude that more study and far more debate among bench and bar is needed before this issue can be appropriately resolved. The Ninth Circuit's experience indicates that with good leadership a large court can keep current and, in the eyes of many, do its job. Thus, we are encouraged to believe that, at least for the next five years, the present system is capable of absorbing the caseload while further thought is given to a future course of action.

(c) Other Structural Proposals

We do not mean to suggest that the only options are categorically either small or large circuits. The Committee studied the following alternatives:

1. Adoption of a certiorari system, permitting each court to control the number of cases it reviews (i.e., abolish appeals of right in some or all cases).

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[109] Judges and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court, 51 U. Chi. Law Rev. 541 (1989).

[110] One piece of data contrary to Professor Hellman's report is found in the answers by Ninth Circuit district judges and attorneys to a survey published in July 1987. Asked if they agreed with the statement "There is consistency between panels considering the same issue," 59 percent of attorneys and 68 percent of district judges disagreed. Many respondents felt strongly that there was no consistency. Professor Hellman acknowledged a degree of inconsistency in those Ninth Circuit cases where the governing legal rule permitted a court to apply a variety of judgmental factors, of a type that could vary from person-to-person. Since his study did not attempt to compare the Ninth with smaller circuits, which presumably might also reflect different judgment calls in such matters, it is difficult to assess whether the Ninth differs in this respect from other courts. As the Supreme Court itself indicates, small size does not guarantee uniformity of view. A further question raised as to the Ninth Circuit has been its relatively long period between the filing of an appeal and disposition (approximately 14 months). This is the second longest in the nation.

2. Abolition of the present circuits, and replacement with one of several new structures designed to accommodate more judges and a greater caseload.

3. Retention of the present system, with, perhaps, study of further innovations to make the "jumbo" circuits of the future more manageable.

The Committee has looked into these possibilities with as much care its short timetable permits. Alternatives 1 and 2 require fundamental structural changes in the judicial system. The choices are difficult and complex and we see few benefits in selecting one specific change now rather than inviting public consideration of the entire matter over the next few years.[111] Other Committee proposals, it is hoped, may result in a reduction in appellate caseload, relieving some pressure for change or tipping the scales towards a different alternative. Less likely, but still possible, fundamental changes in society or in the economy might bring about such a caseload reduction. Finally, members of the bench and bar should be brought more fully into the discussion.

We think it important, however, to set out the practical alternatives which we have found, since it is against these options that the choice of retaining the current system must be made.

1. Should a system of court of appeals certiorari be adopted?

A simple way to control the rising appellate workload would be to give to each of the courts of appeals the power now possessed by the Supreme Court to control its own docket. Courts of appeals could tailor to their available judgeship resources the number of appeals they will determine. A screening procedure and supplemental rules would enable each court to decide which cases to hear. Furthermore, the screening procedure could include a requirement, much like the certificate of probable cause required in habeas cases, that all appellants first seek the district court's approval to appeal. While the court of appeals could still grant review if the district court declined approval, the lower court's view would be helpful. Several state courts, notably in Virginia, West Virginia and New Hampshire, have adopted a discretionary review procedure, as has the United States Court of Military Appeals.

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[111] The Committee, accordingly, takes no position on the question of splitting the Ninth Circuit. That question involves issues peculiar to the region with which we are not qualified, in the time or with the resources we have been given, to address. Insofar as the question turns on whether, as a general principle, we disfavor circuits of that size, we think an answer would be premature, since it would require us to determine now whether a major reorganization touching upon all or most of the circuits in the nation is desirable. As noted above, that is an extremely difficult puzzle, the pieces to which are not yet all available.

The argument against discretionary review is that it must be conducted in a very painstaking manner unless it is to do violence to the tradition of appellate error correction. Unlike the Supreme Court, courts of appeals are traditionally vested not just with law-declaring, but also with an error-correcting responsibility. To determine if error could have occurred below, an appellate court will have to conduct a fairly comprehensive examination, aided by briefs and by the trial record. The amount of time spent in this searching kind of inquiry, as a prerequisite to review, may be just as great as the efforts a court of appeals currently makes in identifying already docketed cases for summary or other disposition. As discussed elsewhere, today's courts of appeal have become adept at screening and moving weaker cases rapidly, without oral argument or protracted procedures. Moreover, the danger of expending time twice exists: first to consider whether to allow review, and later, if review is allowed, to decide the case.

On the other side, a _certiorari_ procedure can be tailored almost infinitely to the needs of the system. If the caseload were overwhelming, the grant or denial of _certiorari_ could be turned into a less sensitive process. The judges would not be obliged, as they are when handling a true appeal, to satisfy their consciences that they approve or disapprove of a particular outcome. "_certiorari_ denied" could simply mean: "We don't have room, and your case seems less troublesome than others."

Conceivably _certiorari_ could be combined with procedures such as truncated review of a colleague's case by a panel of judges operating as an appellate division of the district court.[112] The difficulty with such a procedure would, again, be that the administrative costs, and judge-time, could well be greater than the fast-track time presently spent by a circuit court on many of its cases.

One thing is clear. While the Supreme Court has never held that an appeal is constitutionally required, the federal system and virtually all state systems now provide one appeal as of right to all litigants. Change of that tradition, even if in the civil area alone, would be a major transition in our philosophy. It might conceivably become a needed step if the costs of providing an appeal in each case become too high. But the screening and tracking techniques now used by appellate courts may be adequate. The Committee sees adoption of certiorari review as an action of last resort, and does not recommend it. It should, however, be studied because it is an obvious alternative to building a costly, more elaborate appellate structure should caseload pressures prove intractable.

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[112] M. Pollak, Amici Curiae, 56 U.Chi. L.Rev. 811 (1989) (Book Review).

2. Alternative Court Structures

The Committee reviewed four types of structural proposals (besides retention of the present format). Each type has many possible variations, and, as members of the Committee noted, it is possible also to meld types.

Type I. Multiple Small Circuits. To return to collegial small circuits, the present circuits would of necessity have to be eliminated and entirely new circuits drawn, limited to nine or ten judges each. Problems of geography mignt be troublesome; indeed, some states, like California, might have to be split. To cope with future caseload growth (such as that which overtook the Eleventh and Fifth Circuits only a few years after their division), a mechanism might be developed for examining and, if needed, redrawing circuit boundaries every decade or so in order to maintain a proper size.

The problem with any such restructuring, as noted above, is how to control the increase in intercircuit conflicts generated by an increased number of circuits.

One suggested method would be to require all circuits, on a national basis, to adhere to the precedent established by panels of other circuits, except, of course, where the Supreme Court has spoken. However, a rule of national stare decisis must allow for the reversal of decisions of other panels believe to be clearly erroneous. One method proposed is to create intercircuit review panels that would have the power to resolve conflicts between the circuits (subject to Supreme Court review). Another option would be to grant nationally binding status, in certain circumstances, to the opinion of the en banc panel of a particular court. The important point about arrangements of this type is that judges from the circuits themselves would be utilized, in some formalized manner, to issue pronouncements binding on colleagues beyond their own circuits. Intercircuit conflicts could thus "be cut off at the pass," without total reliance on the Supreme Court as the sole arbiter. Note that under this scheme, no "second tier" or other formal court structure between the courts of appeals and the Supreme Court would exist.

Type II. A Four-tier system. Perhaps the most obvious structural way to accommodate more judges is to add an additional tier of courts. The present system has three tiers (trial, circuits, Supreme Court). An expanded system might have four (trial, appellate I, appellate II, Supreme Court). It is commonplace in business and governmental structures when too many people are reporting to "the Boss" (here, the Supreme Court) to reduce those who report directly, and make the others report "through" them. This concept has led many states to create a tier of intermediate appellate courts. The same could be done federally. For example, twenty or so circuits, of convenient size, could comprise a bottom tier. The upper tier would consist of four or five "higher" tribunals, each located in a different part of the nation and consisting of perhaps seven judges each. Each new upper tier court would hear cases on a discretionary basis from four or five of the circuits. An advantage of this system might be its tendency to focus the primary law-declaring (as opposed to error-correction) function within the four or five upper tier courts. Thus a more compact body of primary precedent would replace the voluminous and perhaps increasingly disparate case law that 200 or 300 co-equal circuit judges, governed only by a distant Supreme Court, would generate. With Supreme Court review becoming relatively rare, the new upper tier would have an important supplementary role. This system would also constrain unbridled intercircuit conflicts but in a non-mechanical way. Ample "percolation" would continue. Such a system could readily absorb the new judges that the system needs, would enable all the individual courts at both levels to remain small, and yet would preserve coherence. There is some concern that two tiers may make it harder to attract able jurists.

Type III. National Subject Matter Courts. Another alternative is to create national subject-matter courts that would serve to relieve the regional circuits of much of their current caseload. In the American Bar Standing Committee on Federal Judicial Improvements March, 1989 Report,[113] the majority recommends what it calls "nonregional appellate courts defined by subject matter," principally, a national court of tax appeals and a national court or courts to hear administrative appeals. Subject matter panels in the regional circuits are also recommended. Obviously, a significant advantage of subject matter courts of appeals is that they would eliminate intercircuit conflicts, provided all appeals of that type can be handled by one upper-level subject-matter court.[114]

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[113] The United States Courts of Appeals: Reexamining Structure and Process after a Century of Growth (1989).

While many bar leaders and judges oppose what they call "specialist courts," the concept is not so limited but includes courts like the Federal Circuit and, in some areas, the D.C. Circuit, which are composed of generalist judges whose jurisdiction is defined, at least sometimes, by the subject matter of the cases. The existence of these and certain Article I courts indicate that subject matter courts already have a recognized place among the country's judicial institutions.

However, the Committee has difficulty viewing subject matter tribunals as providing major relief for the present courts of appeals. If the elements of the ABA standing committee report were adopted, they would affect only a small portion of the caseload. And a wider creation of subject matter courts would, in our view, raise numerous political and organizational issues. The concept is nonetheless worthy of continuing research and study, especially as certain types of cases undoubtedly are best handled by subject matter tribunals. For example, an Article I tribunal to handle all entitlement appeals such as Social Security,[115] Veterans' benefits, and the like, seems well worth considering.

Type IV. A Unified Court of Appeals. Another proposal has been that all courts of appeals be merged and administered as a single national body. The Committee has examined a model of such a consolidated enterprise. It presents an enormous and complex picture. Our concern as to such a structure is that it might possess the faults typical of a central bureaucracy.

The semi-autonomous circuit courts of appeals, and the district courts, have responded with considerable initiative to a rising tide of demands over the last twenty years. We believe that this initiative stemmed in part from the feeling of judges and administrators in particular locales that the challenge was a challenge of their own, requiring their own response. Had they been part of a nationwide bureaucratic structure, the commitment might have been less. The modern trend in the federal courts, of which we approve, has been towards decentralized administration. A move towards an administratively centralized court of appeals is a move in the opposite direction.

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[114] See also Meador, A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Court of Appeals, 56 U. Chi. Law Rev. 603 (1989).

[115] See our recommendation on Social Security Reform.

ministratively centralized court of appeals is a move in the opposite direction.

Of course, a nationwide entity does have its advantages, one of which is the ability to divert judges and resources to courts of particular need. Another advantage is the elimination of intercircuit conflicts. A feature of the unified model presented to the Committee is to distinguish between panels handling routine, fact-specific disputes and those handling cases where law-declaring would be required. Only in the latter class would opinions be written.

Type V. "Jumbo" Circuits. It has been suggested by Judge J. Clifford Wallace that the current circuits should be reduced to several "jumbo" courts.[116] He notes that this structure would curtail intercircuit conflicts (there would be fewer circuits) and allow the larger circuits to more easily shift resources within their borders. Such a system might call for the creation of intracircuit divisions, would require small en bancs to function effectively, and might well require further innovations -- such as strengthening the en banc so as to transform it into something closer to a supervisory court within a court. If the nation were divided between, say five "jumbo" circuits, the structures created within each circuit might have the effect, when added together, of creating, nationwide, something like the two-tier regional system described under Type II.

There are endless variants on the above five types: we think, however, that they suggest in a general way the alternative concepts that are available. In the recommendation which discusses intercircuit conflict section, in discussing the control of intercircuit conflicts, we refer to a pilot study aimed specifically at resolving conflicts in the current system.

3. Retaining and Managing the Present Circuit System

As indicated above, we would not choose to create from scratch the present courts of appeals. Not only are their sizes and territories incompatible and quixotic, but their composition and style bear little resemblance to the small, unitary courts that came before them. Yet, some find comfort within a familiar structure. The circuits so far have done extremely well in managing their growing caseloads. Also, they have all coped well with a steady increase in size.

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[116] The Nature and Extent of Intercircuit Conflicts: A Solution for a Mountain or Molehill, 71 Cal. Law Rev. 713, 940-41 (1983).

The fact must be faced, however, that a continuance of present caseload trends must inevitably transform most if not all circuits to "jumbo" units having 20, 30 or 40 judges. And this will occur within several decades, or even sooner. (Or -- unless appeals of right are replaced by discretionary appeals -- the courts will simply become bureaucracies where staff, not the judges decide most cases.)

If the current structure is retained, we have no doubt that the circuits will be obliged to turn to small en bancs, as in the Ninth Circuit. As larger circuits, they may also wish to create divisions, and experiment with the concept, not yet adopted by the Ninth Circuit, of rotating judges within a particular division. They may also wish to consider developing a "flagging" system where an assigned staff notifies judges of perceived intracircuit conflicts. And as already noted, the small en banc court may eventually become, in effect, a higher court-within-a-court. These and other innovations might eventually make it possible for the present circuits to function with a number of cases and judges exceeding anything we can presently imagine. They will, however, bear little resemblance to the courts of appeals known in the past. It may be that in the end, as has the Ninth Circuit, we find that "jumboism" works.

If, after study, the status quo is favored, we have no doubt that the larger circuits will turn to small en bancs, as has the Ninth Circuit. As larger circuits, they may also wish to create divisions, and experiment with the concept, not yet adopted by the Ninth Circuit, of rotating judges within a particular division. They may also wish to consider developing a "flagging" system wherein assigned staff notifies judges of perceived intracircuit conflicts. These and other innovations eventually may make it possible for the present circuits to function with a large number of cases and judges.[117]

Separate Statement of Mr. Aprile, Judge Cabranes and Mrs. Motz:

No one disagrees that this subject deserves serious study in the years ahead. The various proposals noted in the text have not been approved by the Committee. Some are, to say the least, controversial. Comments by concerned citizens on these proposals, and on the utility of including a reference to them in the Committee's final report, will undoubtedly inform the Committee's consideration of these questions in early 1990. We hope to hear from the bar, the bench and law teachers regarding these proposals.

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[117] See Lay, The Federal Appeals Process: Whether We Goest? The Next Fifty Years (1988) (unpublished paper).

COURT OF APPEALS - THE RISE OF INTERCIRCUIT CONFLICTS

- **Congress should authorize an experimental pilot project, lasting over a four year period, monitored by a committee of the Judicial Conference of the United States.**

Much concern has been expressed over the rise in intercircuit conflicts. It is recommended that Congress authorize the Supreme Court to refer down to an en banc court of appeals not involved in the conflict a case presented to it by certiorari petition for final disposition of national precedent on the conflict issue.[118] The referral would be on a random basis that would preclude the Court from knowing the recipient of the case before the referral decision was made. The Committee suggests that such a plan include the following points:

a. The en banc proceeding to resolve an intercircuit conflict should take place in a circuit not involved in the conflict.

b. The Federal Rules of Appellate Procedure should be amended to establish uniform procedures and time limitations to govern the transmittal of each case from the Supreme Court to the circuit court for en banc review of the conflict issue. For all other purposes, including size and composition of the tribunal, a circuit court of appeals receiving a conflict referral from the Supreme Court shall employ its established en banc procedures in the disposition of the conflict issue.

c. The Supreme Court should be able to refer any case to such a circuit en banc conference before or after granting or denying certiorari or before or after noting probable jurisdiction of an appeal. The Supreme Court should have authority to direct such an en banc circuit conference to decide any case so referred which is subject to review by appeal.

d. The decision of the en banc circuit court on the designated conflict issue will be final subject only to the right of the party adversely affected by the decision to seek reconsideration or rehearing of that ruling by the Supreme Court within thirty days from the date the en banc opinion was rendered by the circuit court. No response to such a reconsideration motion will be permitted unless requested by the Supreme Court.

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[118] Provided decisional conflicts referred to a circuit en banc conference shall only involve conflicts arising between the decisions of two circuit courts of appeal over a question of federal statutory interpretation. A conflict between a decision of a circuit court of appeals and the highest court of a state may be resolved only by direct review by the United States Supreme Court.

e. Unless modified or overruled by the Supreme Court, decisions of a circuit en banc conference of any circuit, when the case has been so referred by the United States Supreme Court, should be final decisions and binding on all courts of United States, and, with respect to questions arising under the constitution, laws, or treaties of the United States, on all other courts.[119]

In the first half of the 1900's, the Supreme Court easily fulfilled its role of fashioning law for the entire nation. As recently as 1960, the Supreme Court reviewed approximately three percent of all federal appeals. That proportion has dropped to less than .5 percent, and will continue to drop as the total number of appeals rises. The Supreme Court handles roughly 150 or fewer cases annually with approximately .75 percent[120] flowing from the federal courts of appeals. This figure has remained constant for some time, with little prospect of a major change. While some commentators suggest that the Supreme Court could increase its output, given the difficulty of the cases that the Court hears, we are not persuaded.

The relative capacity of the Supreme Court vis-à-vis the courts of appeals is important because under the Evarts Act system the Supreme Court is the sole arbiter of conflicts. Sitting at the apex of the federal and state systems, the Court's role is to harmonize the federal law coming from both types of courts, including the regional courts of appeals.[121] Yet, the Supreme Court has long since given up granting certiorari in all cases involving intercircuit conflicts. Thus, a congressional statute may mean one thing in one area of the country and something quite different elsewhere.

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[119] This mechanism is adapted from the one originally suggested by Judge J. Clifford Wallace in 1983. See Cal. L. Rev. 913, 935. We adopt the recommended proposal because it relies entirely on existing court resources without necessitating any structure that might renew the heated debate regarding the Hruska proposal and its progeny.

[120] In the 1989-90 term the Court appears to be taking a somewhat smaller number. Greenhouse, N.Y. Times A-1 (Nov. 28, 1989).

Because of the perceived need for greater capacity to resolve intercircuit conflicts, the Hruska Commission, in 1975, urged the creation of a new National Court of Appeals, intermediate between the Supreme Court and the circuits. Under the Hruska Commission's plan, the Supreme Court would refer 150 cases a year "down" to the new tribunal, thus doubling the system's capacity to determine federal law on a nationwide basis. The Hruska Commission plan never reached fruition and subsequent proposals for a similar body, including one manned by existing circuit judges, have been unsuccessful. But the problem of intercircuit conflicts has not gone away.

The Committee does not renew the Hruska Commission's recommendation for a new National Court of Appeals. We do, however, urge the importance of achieving as soon as possible a full understanding of the impact on our system of the growing number of unresolved intercircuit conflicts. All conflicts are by no means bad: they may serve as a useful means to develop legal doctrine and insight. However, a judicial system that cannot, within a reasonable time, provide a nationally binding construction of an Act of Congress in instances where national uniformity is important would seem flawed.

The difficulty in assessing the extent and seriousness of intercircuit conflicts stems from a lack of comprehensive data. Some valuable work has been done, but a full study requires resources beyond those of the individual scholar. Jeffrey Barr has synthesized for the Committee the literature and research to date. Extrapolating from findings by several researchers, he estimates that the Supreme Court refused review of roughly 60 to 80 unresolved "direct" intercircuit conflicts that were presented to the Court by petitions for certiorari in 1988. This number does not include cases involving less direct conflicts (e.g., fundamentally inconsistent approaches to the same issue).

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[121] As Professor Meador writes:

". . . [T]he Supreme Court remains the only institutional means through which this vastly increased outpouring of decisions can be harmonized and made uniform throughout the nation." 56 U. Chi. L. Rev. 604 (1989).

Barr emphasizes that the numbers tell only part of the story: "One can only gauge the need for federal court restructuring to deal with this problem by scrutinizing the conflicts and deciding which are important or 'intolerable' and which are not." Barr identifies several factors as relevant to distinguishing "intolerable" conflicts from those that are not. These factors include:

(1) Where a split in the law creates economic costs or other harm to multi-circuit actors, such as firms engaged in interstate commerce. An interstate business regulated under federal law is likely to be adversely affected by non-uniform construction of the law. Although the particular law may not be important enough to interest the Supreme Court, the economic effects of unresolved conflicts may be quite harmful. Problems of this nature are not always evident to a judge or to a trial lawyer. The adverse consequences are felt in the planning and execution of business transactions, or in their avoidance. Some congressional enactments demand a more uniform national interpretation than others do; yet, the Supreme Court does not always provide uniform review. For example, Professor Turley found that the Supreme Court had been more willing to resolve conflicts under the Longshoremen and Harbor Worker's Compensation Act ("LHWCA"),[122] a statute for which Congress did not regard national uniformity as so important than under COGSA, where conflicts are so harmful that any resolution (even the wrong one) may be better than none.

Significantly, two organizations that have urged this Committee to address the problem of intercircuit conflicts represent firms engaged in interstate business activities. The Maritime Law Association has identified eight intercircuit conflicts which, until resolved, will adversely affect the clients of its members who engage in maritime commerce. Similarly, the International Association of Defense Counsel, representing Members of the (civil) defense bar, complain that "intercircuit court rivalry is [a problem] which touches all of us representing clients who engage in business in many states."

(2) Prevention of forum shopping. Conflicts may encourage forum shopping, especially since venue is frequently available to litigants in different fora.

(3) Fairness to litigants in different circuits. Certain laws may seem especially unfair if different interpretations result in benefits to persons in one circuit that are denied in another.

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[122] See M.S. Turley, "Observations on the Supreme Court's certiorari jurisdiction in Intercircuit Conflict cases", 67 Texas L. Rev. 1251 (1989).

(4) Avoid problems of non-acquiescence by federal administrative agencies. When courts of appeals conflict in administrative agency cases, the agency is forced to choose between the uniform administration of its statutory scheme and obedience to the different holdings of two courts in different regions. While the Solicitor General can usually obtain review of a particularly serious issue of this type, it may sometimes be more wise for him to let an agency "work around" smaller issues of this nature. The agency may be led in some situations to disregard the holdings of the federal court in similar cases, an approach which breeds disrespect for the law. The General Counsel of the Department of Health and Human Services listed a number of conflicts among the circuits in the interpretation of Social Security law. Some involve sums so small "as to be unrealistic vehicles for seeking a writ of certiorari."

We agree that some conflicts are in greater need of rapid resolution than others. In theory, of course, all federal law should be uniform. Conflicts involving many procedural rules, and laws affecting actors in only one circuit at a time, however, may have a negligible effect. We realize that some commentators believe that, while harmful conflicts can and do exist, the Supreme Court can handle them. But Barr's study suggests that the problem is a larger one. Our concern was also raised by the complaints of the Maritime Law Association and others. Finally, the reasoned contrast between today's mounting numbers of appeals and the relative minuscule size of the Supreme Court's stable docket suggests that all conflicts cannot reach the Supreme Court. Conflicts in high profile areas may reach the Court, but surely our legal institutions should be able to provide a single, nationwide rule of interpretation for any federal statute where national uniformity is desirable within a reasonable time.

There should be a study of the number and frequency of unresolved conflicts, coupled with an analysis of how many of them are truly "intolerable." We need to know how many "intolerable" conflicts our system is generating which are unlikely to be resolved by the Supreme Court.

Although necessary, a study alone will only generate further debate and postpone a solution. Therefore, we propose that the study be accompanied by the pilot project described above. By putting mechanisms in place designed to resolve real conflicts, we can expect to develop a practical understanding of the problem and likely solutions. In particular it will be possible to find out whether there are many conflicts which, although unsuitable for Supreme Court review, deserve national resolution at another level. In designing such a pilot project, we have avoided recommending any new structure reminiscent of the controversial new court recommended by the Hruska Commission.

Congress should authorize an experimental pilot project for a four-year period. We accordingly ask Congress to authorize the Supreme Court to participate in the experimental pilot project for a four-year period as described at the beginning of this section. The project should be carefully monitored by a properly staffed committee of the Judicial Conference. That Committee should tabulate and evaluate conflicts on a national basis and recommend whether the experiment should be continued, modified, or discontinued after four years.

There may be some concern about the additional workload the "en banc" procedures would mean for the courts of appeals. However, while the absolute number of conflicts each year may exceed 60, we assume that the Supreme Court will refer a much smaller number for purposes of this pilot project. In the enabling legislation Congress might consider authorization for the purpose of the project more liberal use of the reduced en banc provisions now followed in the Ninth Circuit.

The Committee also recommends, apart from the pilot project that when a court of appeals reviews a case raising an issue already decided by another circuit, considerable respect ought to be accorded the earlier decision and a panel contemplating disagreement with the panel of another circuit ought to circulate its draft opinion among the remaining judges of the court for their comments.

Separate Statement by J. Vincent Aprile, II:

To minimize the cost to litigants to reduce delays in the appellate process, to foster finality, and to avoid unnecessary relitigation of issues, the Supreme Court's decision to refer a conflict issue to an en banc circuit court of appeals for resolution of the conflict issue should terminate its involvement in the disposition of that particular case. Once the Supreme Court refers a case to an en banc circuit court of appeals for final disposition of the conflict issue, the Supreme Court should be prohibited from reviewing the decision of the en banc tribunal. The Supreme Court should only be able to reverse the precedent generated by the en banc court of appeals in the context of another case after granting certiorari to review the ruling's application in a successor case.

Basically, the committee's proposal is advanced to assist the Supreme Court, to reduce the circuit courts' workload, and to provide uniformity in the interpretation of federal statutory law which should generate benefits to litigants and litigators within the federal court system. In this spirit, the substitution of an en banc circuit court as a replacement for the Supreme Court to decide a statutory conflict issue should not constitute another layer of appellate review, but should be seen as an alternative to a disposition on the merits by the Supreme Court.

To allow the losing party to revive the Supreme Court's interest in the conflict issue, even through a reconsideration motion, extends unnecessarily the appellate litigation process to the detriment of both the litigants and the judiciary. To require a federal circuit court to convene en banc to resolve a conflict between circuits and to promote uniformity of federal law appears reasonable when the en banc decision will put at least a temporary resolution to the interpretation issue. Such a referral procedure appears unnecessarily duplicative when the losing litigant and litigator are permitted to persuade the Supreme Court that the national precedent rendered by en banc tribunal is incorrect and should be reversed immediately by the Supreme Court through a reconsideration process (in a court where no initial consideration of the issue's merits had ever occurred).

Finally, there is merit to a proposal, particularly an experimental one, that truly requires the Supreme Court to select from three disparate options with no escape clause to allow the Supreme Court to resurrect its once abandoned jurisdiction over a case. When the Supreme Court denies certiorari and reconsideration of that denial where appropriate, that case ceases to be available to the Supreme Court as a vehicle for resolving issues of law. Similarly, under this proposal, the Supreme Court's decision to refer the conflict issue to an en banc tribunal for resolution should be a choice between keeping the case by granting certiorari to resolve the question or confidently delegating, at least in the context of this case, the ultimate resolution of the conflict issue to another court with no expectation of or potential for reassuming jurisdiction over that matter. There should be a cost, albeit small, to the Supreme Court's decision to employ this alternative means of resolving conflicts. Loss of jurisdiction over the controversy is an appropriate cost to the Supreme Court which also lends greater dignity and importance to the function of the en banc tribunal in this experimental procedure.

In view of the experimental nature of this proposal and the concerns expressed elsewhere in this report about the caseload of the federal court of appeals, the proposal should limit the Supreme Court's referral capacity to not more than forty cases per year. Such a limitation precludes the en banc procedure from becoming a logistical or administrative burden to the federal circuits while insuring that the Supreme Court's

D. LONG RANGE PLANNING IN AND FOR THE FEDERAL COURTS

- **The Judicial Conference should establish a strategic planning capability. While the precise organization of such a capability should be left to the Judicial Conference, the needed research staff should be located within the Federal Judicial Center. The overall direction and control of strategic planning for the judiciary and of the work of the research staff should be vested in a subcommittee of the Conference's own Executive Committee, under the ultimate authority of the Executive Committee and of the Conference itself. The research staff located within the Federal Judicial Center should have access to experts and groups outside the Judicial Branch and should aim to become a facility of outstanding quality.**

The volatility of change throughout our society has made long-range planning a subject of increased importance in all areas. The judiciary, as a body, has never been well- equipped to focus on down-the-road problems because the judges who comprise it must attend to overwhelming day-to-day responsibilities that consume their time.

This is not to say that some excellent planning has not been performed by the Administrative Office of the United States, the Federal Judicial Center, the committees of the Judicial Conference, and the court administrators. Soon to be introduced legislation that would enable the judiciary to take greater initiative in space and facilities management,[123] is one such example. And, recently, the Director of the Administrative Office established a planning office to help guide its operations.

Yet, the rate of change has, if anything, accelerated. The exponential increase in case volume alone flags serious problems ahead. The federal judiciary no longer can afford to be solely reactive; it must acquire a better ability to recognize trends and future problems before they occur.

Currently, when planning needs surface, as signaled informally through congressional dissatisfaction, complaints of judges, or a complaint noted by the Chairman of the Executive Committee, the lack of resources in-house sometimes becomes a problem. The Federal Judicial Center is statutorily authorized to perform a planning function. It could be, and in a small way is, the judiciary's "think tank", but has few resources, and traditionally has considered itself to be required to invest its time in projects of narrow, well-defined scope. At present, then, most operational planning is done in the Administrative Office. Outside consultants occasionally have been hired to study problems that the judiciary lacked the resources to investigate.

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[123] See legislation entitled The Judicial Space and Facility Management Improvement Act, which should be introduced of the U.S. Senate in early 1990.

Thus, no one person or entity takes on the mantle of forecasting emerging problem areas and developing methods for avoidance or mitigation of those future problems. In a sense, this Committee is a preliminary effort to fill that void. Of course, such periodic high-level policy reviews should continue but in greater depth than our resources permit. No occasional effort can provide the information and insights that are needed on a continuing basis.

The need for such a unit is obvious, yet we face two vexing questions that must be answered prior to establishment. First, the new unit must have a defined role different from other planning organs of the federal judiciary in order to avoid overlap and jurisdictional disputes. And when such overlap and jurisdictional disputes do arise, as they will, a central authority, representing the judiciary as a whole, must be authorized to settle them.

Second, the unit must be carefully positioned in such a way that its efforts are sufficiently isolated from day-to-day management so that its resources are not expended on short-term issues. On the other hand, it must have sufficient contact with operational units so that its work is not abstract and that its proposals find their way efficiently into the mainstream of judicial planning and operations.

With these two concerns in mind, the Committee offers the following conception: The long-range planning unit should concern itself with matters related to the overall activities of the federal judiciary rather than isolated problems. Thus, it should develop policy proposals capable of broad application and should not be concerned with specific and isolated problems.[124] It should, for example, be concerned with the manner in which the judiciary proposes and plans for the addition of new judgeships; it should not be concerned with the need for a new judge in a particular district or the need for a courtroom for that particular judge's use.

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[124] Examples may help to illustrate this definition. A long-standing concern about intercircuit conflicts is recognized, yet no individual has ever been charged with the responsibility for gathering the data necessary for understanding that problem or for proposing solutions to it. A long-range planning group, we think, would appropriately consider this. Other areas ripe for long-term study include the education of (continued...)

The entity should be housed in the Federal Judicial Center. As noted, the Center already has in its charter the task of long-range planning; it was felt that no new legislation would be required if the entity were placed there. Moreover, placement in the Center is more attractive than the Administrative Office because the Center is a more independent entity; placement in the Administrative Office, it was thought, might lead to an emphasis on concerns related to day-to-day operational difficulties. It is vital that the entity have ready access to the rich research capabilities of the Federal Judicial Center.

Concern was raised, however, that a planning unit in the Center would be so isolated as to be impotent. The Center with its independent board is deliberately and appropriately outside the machinery of the Judicial Conference. Since the planning unit would of necessity need to have close association with the Conference and its committees, such isolation was thought unwise.

Accordingly, if the planning entity contemplated were to be integrated within the system as a whole, the Judicial Conference, must be in a position to determine what issues to assign to it, and what to assign elsewhere. The Conference's Executive Committee is, in our view, the logical body to handle this allocative function. While the personnel of the Center and its research standard would be subject to the control of its own Board, thus ensuring independence, the determination of what planning functions to assign to it would be up to the Executive Committee, or perhaps more properly to a subcommittee charged with oversight of strategic planning in the judiciary.

Thus, what is needed, is a new unit, free from the demands of operational units. Administratively, its research arm should be placed in the Center and have ready access to the research capabilities of the Federal Judicial Center. It should also establish scholarly relations with outside planning

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124. (...continued)
trial judges as to science and technology matters. Also, basic questions about the operations of the public defenders system have been put before this Committee. We have, in response, proposed a major study of this area. A long-range planning unit might have the capacity to serve as a major resource for such a study.

and research groups. To provide access to the operational machinery of the judiciary, it should report directly to a subcommittee of the Executive Committee of the Judicial Conference, rather than to the board of the Federal Judicial Center. That subcommittee, charged with strategic planning, should include representation from both the Federal Judicial Center and the Administrative Office. It might also include representation from one or more major committees of the Judicial Conference and, most importantly, should have access to persons outside the judicial branch who may be of assistance in formulating policy.

E. OFFICE OF JUDICIAL IMPACT ASSESSMENT (OJIA)

- **An Office of Judicial Impact Assessment should be created in the Federal Judicial Center. That office would be charged with advising Congress on the resource impacts of proposed legislation as well as offering technical assistance on drafting matters likely to unnecessarily lead to litigation. The work of this Office must be closely coordinated with the Office of Legislative and Public Affairs, perhaps by having the latter office serve as the conduit for communications.**

Congress should create an entity within the Judicial Branch that would provide information to Committees and staffs on the effect of proposed legislations on the judicial branch. The Judicial Conference and the Administrative Office devote significant resources to legislative matters. Of necessity, these efforts are focused on those bills that are sponsored by the judiciary or that directly impact on the operations or budget of the judiciary. These efforts, particularly in recent years, have been commendable, but we believe that an additional element is needed to supplement this program.

Much of the caseload spiral of recent years has resulted from the passage of a broad range of statutes that have specifically created or implied new causes of action. The creation of a new cause of action is entirely within the province of the legislative branch. However, the judiciary is charged with the duty of providing a forum for these cases. Because of that duty, it is appropriate and useful for the judiciary to advise Congress of the impact that proposed legislation will have on the judiciary and the need, if any, for additional resources to carry out the legislation. For Congress to view such information as acceptable and useful, the supplier must be seen as being an objective entity.

In the past, the judiciary has proposed that judicial impact statements be required. We believe that the objectives of that proposal can be achieved by creating within the judiciary itself an office devoted to judicial impact assessment. This office ought to be located in the Federal Judicial Center but must of necessity operate in coordination with the Office of Legislative and Public Affairs at the Administrative Office. The advantage of placing this office in the Center is that it would be separate from operational entities. The danger in such a structure is the risk that the judiciary would speak to the Congress with two voices, resulting in harm to both branches.

To avoid that danger, we believe that the office should be structured so that it would not be allowed to speak independently to Congress. For instance, Congressional requests for impact assessment could be routed through the Legislative and Public Affairs Office as could the return impact assessments. The Legislative and Public Affairs Office would not serve as a censor in either direction but could, for instance, advise the impact assessment office of prior Administrative Office studies on the subject or Judicial Conference positions on the issue in order to avoid duplication or ambiguity.

The office would not endorse or condemn legislation. It would confine itself to an analysis of the impact of the legislation. That impact assessment would often be in the form of needed resources. In addition, though, the office could advise the Congress of drafting defects that might unnecessarily breed litigation (such as a lack of a statute of limitations or uncertainty as to whether a private right of action was intended). Finally, the office would supply assessments useful to the Judicial Conference Committee on long-range planning discussed.

The congress may also find it helpful to develop its own resource for committees and staff seeking information on the impact of potential legislation on the Federal Judiciary.

V. Other Significant Issues

A. ENSURING FREEDOM FROM BIAS AND DISCRIMINATION IN THE JUDICIAL BRANCH

1. Discrimination Complaint Procedures

- **The Judicial Conference should amend the existing Discrimination Complaint Procedures to ensure that complaints of employment discrimination will receive an independent review outside the court in which the complaint arose. This independent review could be conducted by the judicial council of each circuit, by a designee of the judicial council, or by some other alternate reviewer within the judicial branch of the government.**

The federal judiciary can be justifiably proud of its role in promoting civil rights and equal employment opportunity throughout this nation. Nevertheless, the proud history of the federal courts must not blind us to the potential for invidious discrimination. Nowhere is this more true than in the area of employment. The judicial branch currently employs thousands of men and women in all manner of staff positions; there can be little doubt that in a system so large there is a potential for abuse and discrimination. Accordingly, the confidence of employees and the nation at large must ultimately rest on the existence of procedural safeguards designed to eliminate discrimination and misconduct within the judicial branch.

The Model Plan currently employed by the Judicial Conference and the federal courts seeks to provide for the prompt review of complaints of invidious discrimination including complaints of restraint, interference, coercion, discrimination, or reprisal. Under the existing procedures, the Court's Equal Employment Opportunity Coordinator first attempts to resolve the complaint informally and may conduct any investigation deemed necessary. The Coordinator then files a report on the matter with the Chief Judge of the Court and, if either the complainant or alleged discriminatory official objects to the findings of the Coordinator, the objecting party may file with the Chief Judge a written request of review. The Chief Judge will conduct any further proceedings deemed necessary and will determine the appropriate resolution of the complaint. The decision of the Chief Judge is final and may not be appealed.

Although this procedure appears to have been successful over the years, the complete lack of review by a person somewhat removed from the situation is arguably a cause for concern. Indeed, it is not difficult to imagine a situation in which a fact-finder's impartiality and judgment might be clouded or questioned due to over-familiarity with the parties -- one or both of whom he or she may have appointed -- or allegiance to the Court and its officers. The opportunity for an independent review made from outside the court in which the complaint arose could effectively eliminate this possible problem.

Perhaps the most promising choice for the role of independent reviewer would be a committee of the circuit's judicial council, which would enjoy the double advantage of being both familiar with and independent from the court and personnel in question. However, the Judicial Conference has been reluctant to impose additional responsibilities on the judicial councils and has twice rejected proposals of this sort. We recognize the concerns of the Judicial Conference and acknowledge the significant burdens of time and expense imposed by such a system of outside review. Nevertheless, it is important that we recognize the need for the sort of review in the discrimination complaint process that will bolster the confidence of judicial employees and reinforce the proud heritage of the federal judiciary.

In an effort to avoid undue additional burdens on already overtaxed active judges, we suggest that the judicial councils appoint a review panel with a rotating membership comprised of district court judges and circuit judges. This will effectively prevent any single judge or group of judges from bearing the full burden of outside review. Moreover, we suggest that the judicial council and/or panel be empowered to appoint any judicial officer within the circuit (but outside the court in which the complaint arose) to investigate and/or resolve grievance complaints.

2. Grievance Procedures.

- **In addition to providing for independent review of discrimination complaints, the Judicial Conference and judicial councils of the circuits should also establish a set of informal grievance procedures to handle and resolve other, less serious complaints.**

Almost fifteen years ago, the Administrative Office of the United States Courts drafted a set of model grievance procedures for employees in the administrative office.[125] The majority of courts continue to have no apparatus for addressing and resolving the concerns and complaints of federal judicial employees. We believe that the use of such procedures is good practice in any organization, including the judiciary. They would effectively promote efficiency and respect for the administration of our nation's courts, and we believe that they could be implemented easily and quickly in all but the smallest of our courts. Accordingly, we recommend that all circuits consider adopting such systems wherever appropriate.

3. Education.

- **The Judicial Conference of the United States, the Federal Judicial Center, and the judicial councils of the various circuits should continue and expand their efforts to educate judges and other personnel of the Judicial Branch of the existence and dangers of racial, ethnic, and gender discrimination and bias.**

Ours is a nation committed to the principle of equality under the law. For this principle to be more than an aspiration -- for this principle to become a reality -- we need more than good laws. We need to be able to continue to count on good judges as well. Studies in many state systems reflect the presence of bias -- particularly gender bias -- in state judicial proceedings. Although we have confidence that the quality of the federal bench and the nature of federal law keep such problems to a minimum, it is unlikely that the federal judiciary is totally exempt from manifestations of this general social problem.

In view of the existence of numerous state studies on bias in the courts, we believe it would be unproductive to recommend yet another study. Instead, we prefer to move directly to the proposal of means of preventing and dealing with bias in judicial proceedings and in the operations of the Judicial Branch of Government. Although formal disciplinary procedures may sometimes be a necessary and appropriate response within the Judicial Branch, in most instances they will prove an overly blunt and clumsy instrument. We look to judicial education as the best means of sensitizing judges to their own possible inappropriate conduct and to the importance of curbing such bias when shown by attorneys, parties, and witnesses. To this end, we ask the Federal Judicial Center and circuit conferences to continue and expand their educational efforts.

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[125] Memorandum of R. Glenn Johnson, Chief, Personnel Division, Administrative Office, dated June 1, 1988, announcing approval of Administrative Grievance System for the Administrative Office of the United States Courts.

Judicial education should not, however, end with orientation or yearly circuit conferences. Judicial education should be a life-long process and pursuit. We should never underestimate the power of informal peer pressure. The federal judiciary is a relatively small and collegial body; individual judges can and should make the aspiration of "equality under law" into a living reality.

4. Complaints Concerning Bias.

- **The judicial councils of the circuits should consider establishing in each district and at the circuit level grievance procedures to handle and resolve complaints by members of the public concerning allegations of inappropriate treatment by personnel of the Judicial Branch, including allegations of racial, ethnic, religious or gender bias.**

Despite educational efforts, on some occasions members of the public may have complaints about actions of personnel of the federal judicial system. In some instances, existing discipline mechanisms are available for such complaints and no new mechanisms are needed. Where there are no extant mechanisms, however, appropriate procedures to consider such complaints are an important feature of our commitment to equal treatment.

B. PUBLIC AND MEDIA ACCESS TO THE COURTS

- **In each circuit, either the circuit executive or an appropriate staff member should be designated as the media contact person and should receive training for that task. In addition, training for Chief Judges should include media contact training.**

- **"Press days" should be encouraged as a means of facilitating communication between the courts and the media.**

- **Programs and publications that enhance public understanding of the courts and their operations should be encouraged.**

For the first forty-eight years of its existence, the Administrative Office lacked any type of public information services. Inquiries, particularly those from the media, were handled on an ad hoc basis, although many were referred to the Office of Legislative Affairs or to the Director's Office.

In 1987, however, a full-time Public Information Officer was hired by the Administrative Office and housed in what has become the Office of Legislative and Public Affairs. The Public Information Officer is responsible for handling the public information needs of the federal judiciary, as a whole, and that of the Judicial Conference, in particular. In addition, the Officer disseminates information to the courts and to the media through press releases and a newsletter. He also assists courts in organizing "press days" through which the media and court representatives meet to discuss and inform one another about their work, needs and concerns.

This structure seems appropriate in general but we also believe that it is worthwhile for the circuit executives to give greater emphasis to public information needs.[126] For example, many of the inquiries received by the Public Information Officer concern the activities of a particular court or judge. Accordingly, media relations should receive greater attention and emphasis in the regional circuits.[127] The mechanism for responding to the media inquiries should be decentralized, with part of the responsibility housed in the Administrative Office and part vested with the circuit executives.

C. INCENTIVES AND DISINCENTIVES IN CIVIL LITIGATION

1. Attorney Fee Shifting

- **The case for the general adoption of the "loser-pays" rule for federal court litigation has not been made.**

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[126] The issue of cameras in the courtroom, for example, was considered by the Committee. Rather than take a position on this issue, we chose to defer to the Ad Hoc Committee on Cameras in the Courtroom established by the Judicial Conference. We do note, however, that while much of the interest in this area has focused on the televising of trial proceedings, the televising of appellate court proceedings presents very different issues.

[127] Statutory language is in accord: 28 U.S.C. 332(e)(8) states that the duties of a circuit executive shall include "representing the circuit as its liaison to the . . . news media . . .."

A proposal sometimes made in response to court congestion or baseless litigation is the adoption of the English loser-pays indemnity rule on attorney fees. Making losing parties as a general matter fully liable for the winners' reasonable attorney fees, however, is a sweeping measure with several bad effects that can be avoided by more finely crafted approaches, including modifications of the general "American rule" against attorney fee liability that are targeted on specific problems. Many such modifications have taken place already, in forms consistent with American attitudes on avoiding excessive inhibition on access to justice.

Even the many industrialized democracies that, like England, formally follow the loser-pays rule often temper it substantially, as by imposing only partial liability, providing broad public legal aid, or making the rule inapplicable in significant classes of cases. Moreover, the indemnity rule works harshly in close cases, especially when a plaintiff was entirely reasonable in pursuing a claim that he ultimately loses. As a result, the rule may excessively discourage the pressing of plausible but not clearly winning claims, particularly when the prospective plaintiffs are risk averse -- as is likely to be true of middle class people with something to lose but not so many assets that they can tolerably afford to lose much. Furthermore, for cases in which the parties remain in disagreement on their assessment of the likely outcome of trial, the English rule can actually make settlement less likely -- other things being equal, it increases the negotiation gap between the litigants.[128] Loser-pays attorney fee shifting may be appropriate in some circumstances, such as discovery motions and in business litigation between well-financed adversaries (although such cases are often governed by state rather than federal law).

2. Sanctions for Litigation Misconduct

- Rule 11 sanctions for litigation misconduct should be studied further.

In the current atmosphere of controversy over amended Federal Rule of Civil Procedure 11 on sanctions for misconduct, the call in the recently completed Third Circuit Study of Rule 11 (that the study should be replicated in one or more other jurisdictions) should be heeded -- with dispatch-- before any major changes in the Rule are proposed. In light of evidence supporting concern about sometimes overzealous use of amended Rule 11, however, federal courts could do well to consider the cautionary recommendations of the Third Circuit study.[129]

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[128] References: Rowe, The Legal Theory of Attorney Fee Shifting, 1982 Duke L.J. 651; Rowe, Predicting the Effects of Attorney Fee Shifting, 47:1 Law & Contemp. Probs. 139 (Winter 1984)

The foregoing is not to blink at the controversy over amended Rule 11. It has both strong defenders and strong critics. The latter see it as escalating antagonism in litigation, creating satellite controversies, inhibiting innovative arguments and unpopular claimants, and sowing conflict between attorney and client. Defenders see it as an essential tool to curb substantial cost-inflicting abuses and are inclined to believe that much of the present litigation over Rule 11 is to be expected in early stages with any major change to such a new approach. The Third Circuit study reached mixed conclusions, finding that Rule 11 motions were made in only a small number (0.5%) of Third Circuit district court civil cases; that plaintiffs in general and civil rights plaintiffs in particular tended to be sanctioned at a higher rate than others; but that the Rule did appear to be having desired effects on pre-filing conduct of attorneys and contributing to settlements and dismissals. With the Rule already in place, we see expeditious but careful research along the lines of that already done in the Third Circuit study as essential to see if the criticisms of the Rule have substance, to aid in its interpretation and possible amendment, and to avoid overreaction to problems that some (but by no means all) members of the bar see in the Rule's effects.

Special consideration concerning post-conviction review suggest that, although habeas proceedings are technically civil, Rule 11 should perhaps be held inapplicable in such cases, See United States ex rel. Potts v. Chrans, 700 F. Supp. 1505, 1523-26 (N.D. Ill. 1988), or should be used "only in the most egregious circumstances" and when other remedies such as dismissal for abuse of the writ are inadequate. Anderson v. Butler, 886 F.2d Ill, 144 (5th Cir. 1989).

3. Measurement of Attorney Fee Awards

- **To simplify the process of assessing attorney fee awards, courts should (1) adopt reasonable rate schedules and uniform enhancement factors; (2) use magistrates or special masters as fee taxing masters; and (3) set advance guidelines for compensable items in certain cases. Also, a study should be conducted of alternatives to the "lodestar" method**

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[129] S. Burbank, Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (1989).

of fee award setting, including percentage and hybrid hourly/percentage methods.

Substantial concern exists that under the "lodestar" method of fee measurement -- multiplying hours of attorney time appropriately spent on winning aspects of the case times a reasonable hourly rate -- the job of fee measurement constitutes an undue burden on judges.[130] In addition, the hourly element may encourage lawyers to run up time unnecessarily, often leading either to overcompensation or later litigation over fee padding. Unfortunately, despite dissatisfaction with the current situation, it is difficult to propose ways to simplify the fee award process and ease the burden on courts and litigants. The basic problem is that in many instances fee setting depends upon assessment of the circumstances of an individual case. Moreover, stringency in fee setting threatens to undermine Congress's goals in providing for fee shifting. In addition, this is a sensitive area in which proposals for substantial change are likely to generate significant controversy.

Nevertheless, the federal courts can profitably adopt several measures: 1) to limit disputes about rates and discrepancies among judges, adoption of reasonable rate schedules regionally, nationally, or otherwise; 2) to simplify the handling of the risk of loss, adoption of a uniform enhancement factor or a schedule of factors for different types of cases; 3) to enhance regularity and perceived neutrality in fee awards and to relieve district judges of the task of setting fees, larger districts could designate a single magistrate to become taxing master and pass on all fee applications (or assign the task in some instances to special masters); and 4) to avoid later disputes over fees and apprise counsel of the standards that will govern, adopting either in general or in individual cases guidelines about such matters as the level of attorney involvement that will be compensated. In addition, because of the problems of the lodestar method, study of alternatives seems warranted; we do not propose its replacement now, however, because in many situations it seems inevitable and the alternatives -- chiefly the possibility of basing fee awards in whole or in part on a percentage of the recovery obtained -- need further analysis and experimentation. Percentage approaches, of course, are not possible when defendants are entitled to fee awards or plaintiffs seek only injunctive relief.

D. LEGISLATIVE CHECKLIST

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[130] See, e.g., Third Circuit Task Force on Court Awarded Attorney Fees, 108 F.R.D. 237 (1985).

- **The Committee recommends that a checklist be created for use by Congress during the drafting of bills to encourage statements regarding:**

  (1) the appropriate statute of limitation;
  (2) whether a private cause of action is contemplated;
  (3) whether pre-emption of state law in intended;
  (4) the definition of key terms;
  (5) the mens rea requirement in criminal statutes;
  (6) severability; and
  (7) whether the new bill repeals or otherwise voids previous Federal legislation.

- **The Committee recommends further that this list be supplied to the Office of the Legislative Counsel.**

E. CREATION OF A NATIONAL FEDERAL-STATE COUNCIL

- **The Chief Justice of the United States and the Chair of the Conference of State Chief Justices should create a national federal-state council.**

The Committee notes that the Chair of the Conference of State Chief Justices has suggested the creation of a national State-Federal Council composed of an equal number of state and federal judges. The Council would study and submit recommendations for cooperative action between the dual court systems.

This Committee supports the establishment of a national Council. Interested parties have suggested that one early task of such a Council would be the consideration of a plan or plans to shorten the time required to complete habeas corpus actions by state prisoners. At present, after denial by a state supreme court of relief in a collateral proceeding, the prisoner applies for certiorari -- which is usually denied by the United States Supreme Court. Then the prisoner files a petition in the district court from whence it ultimately goes to the United States Court of Appeals.

Under one approach, the process of securing a definitive ruling on the federal questions in *habeas corpus* might be expedited by providing for review by the appropriate United States Court of Appeals immediately after completion of the state appellate process, rather than requiring the petitioner to first seek *certiorari* in the United States Supreme Court, or to submit the legal issues to the district court.

Under another suggestion, states would be encouraged to impose a form of post-conviction review immediately following the conclusion of the trial and sentencing to create a program of unitary review in the trial court. The appropriate state court,either trial or appeal, would have the authority to hold the defendant's direct appeal in abeyance pending the trial court's disposition of the post-conviction claim. Such a state procedure could expedite the time devoted to state review of all the federal questions in the defendant's case by having them resolved in a single state court appeal.

The Committee takes no position on either of these proposals, but offers each as an illustration of a question which the Council may wish to pursue.

Complex litigation in civil cases may also be an appropriate project for the Council.

Implementation of such projects might be of interest to the State Justice Institute in keeping with the Congressional intention in establishing the Institute.

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Administrative Office of the U.S. Courts
American Bar Association
American Judicature Society
American Law Institute
Arent, Fox, Kintner, Plotkin & Kahn
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ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

July 14, 1989

Honorable Mark O. Hatfield
United States Senate
Room 711, Senate Hart
  Office Building
Washington, D.C. 20510-3701

Honorable Slade Gorton
United States Senate
Room 730, Senate Hart
  Office Building
Washington, D.C. 20510-4701

Dear Senators Hatfield and Gorton:

This is in further response to your letter of June 15, 1989, regarding the costs of implementing S. 948, the Ninth Circuit Court of Appeals Reorganization Act of 1989. The bill proposes to divide the Ninth Circuit into two separate circuits and create a new Twelfth Circuit.

When the Fifth Circuit was divided in fiscal year 1982, a new circuit court office was established in Atlanta, Georgia. Except for the key positions required there, no new positions were established. The judges and their staffs, deputy clerks, and other supporting personnel were administratively transferred from the Fifth Circuit to the new Eleventh Circuit for those districts located in Alabama, Florida, and Georgia. The following positions were required:

Position Title	Number	Grade
Circuit Executive	1	Ungraded
Circuit Executive's staff	4	JSP-13 (2), JSP-10 (1) JSP-9 (1)
Clerk of Court	1	JSP-16
Senior Staff Attorney	1	JSP-15
Chief Librarian	1	JSP-14
Add'l Secretary or Law Clerk for the Chief Judge	1	JSP-9
TOTAL NEW POSITIONS	9	

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1939 – 1989

Based on the new positions above, a new circuit court of appeals would cost approximately $600,000. This amount includes salaries and benefits and costs of space rental, equipment, and supplies.

Your letter mentioned that savings had been realized by purchasing used books and transferring books from the Fifth Circuit to the new Eleventh Circuit. We understand that although savings did occur through transfer of lawbooks and purchasing used books, additional costs were incurred in setting up a new headquarters library in Atlanta. We estimate that, in addition to the costs identified above, approximately $800,000 will be required to establish a new headquarters library. This takes into account expected savings from the use of the existing satellite library, the transfer of lawbooks, and the purchase of used books.

I hope this information is helpful. If you need further information, please let us know.

Sincerely,

Ralph Mecham

L. Ralph Mecham
Director

SLADE GORTON
WASHINGTON

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COMMITTEES
AGRICULTURE
ARMED SERVICES
COMMERCE, SCIENCE, AND TRANSPORTATION
INDIAN AFFAIRS

April 24, 1990

The Honorable Strom Thurmond
Subcommittee on Courts & Administrative Practice
Senate Hart Office Building 223
Washington, D.C. 20510

Dear Strom:

This letter is in response to your questions on S. 948, the Ninth Circuit Reorganization Act of 1990.

> **Do you believe the creation of a twelfth judicial circuit will enable cases to be resolved in a more just and expedient manner than under the current system? Why or why not?**

Yes, I strongly believe that creation of the Twelfth Circuit will heighten the quality of justice and speed its delivery to people within this jurisdiction. While I have included in the record extensive documentation on this point, I would like to highlight a few points. The creation of a smaller Twelfth Circuit will reduce the processing time of cases by substantially reducing the case law and panel decisions requiring review before final determination. This will improve the uniformity of circuit law, making the law easier to apply to the facts of a case. It will also improve the collegiality between judges and encourage discussion of the law.

Great wisdom is found in the observation of Judge Joseph Weis, Jr., chairman of the 1989 Federal Courts Study Committee, who noted, as the number of appellate judges increases so does the divergence in views. This results in more litigation for the American people, because as the law becomes less clear it is more difficult to conform to the law, and good faith disputes occur which must be resolved by litigation. Judge Weis concluded, "an increase in the number of judges I think adds to the uncertainty of the law, which adds to more litigation."

> **What would be the cost to the Federal government of creating a new twelfth judicial circuit including: courthouse space, computer equipment, library facilities, and additional administrative staff to assist in the proper functioning of the courts?**

Despite popular belief, the costs associated with dividing the Ninth Circuit are minimal according to the Administrative Office

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of the United States Courts. The Administrative Office has estimated that division of the circuit as proposed by S. 948, will cost $1.4 million -- slightly more than the current annual travel costs of judges in the Ninth Circuit. The Administrative Office's detailed estimate is attached.

> **Can you explain for the Subcommittee why many state bar associations object to splitting the Ninth Circuit?**

To speculate as to why some bar associations oppose dividing the Ninth Circuit, I might draw an analogy to a Senator being personally approached to support certain legislation by the Majority Leader of the Senate, or perhaps by the President. Quite compelling, you would agree. All of the bar associations in the Ninth Circuit were personally lobbied to adopt a resolution in opposition to S. 948 presented by former Chief Judge Browning or an appellate judge dispatched by him. Obviously, lawyers must practice before the courts, and few are courageous enough to buck such a direct appeal. The American Bar Association, for example, has for the last fifteen years maintained that the Ninth Circuit should be divided. Suddenly, this position changed when attorney members of the American Bar Association were asked by certain appellate judges, who were led by a Ninth Circuit judge, to rescind the ABA's previous official position to divide the Ninth Circuit.

Thank you for giving me an opportunity to answer your questions.

Sincerely,

SLADE GORTON

SG/asl

Attachment

THE UNITED STATES COURTS OF APPEALS: REEXAMINING STRUCTURE AND PROCESS AFTER A CENTURY OF GROWTH

Report of the
American Bar Association Standing Committee
on Federal Judicial Improvements

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Preface

The creation of the United States Courts of Appeals in 1891 provided a federal judicial structure that functioned effectively and served the country well through the middle of the twentieth century. However, the continued increase since the 1960's in the volume of appellate business has placed great strains on those courts. These radically altered circumstances are seriously taxing the ability of the federal appellate structure to maintain nationwide uniformity in the interpretation and application of the ever-growing body of federal statutes and regulations.

These problems were first brought to the attention of the bench and bar by the American Bar Foundation's study in 1968, entitled *Accommodating the Workload of the United States Courts of Appeals*. In the years since, numerous other studies, reports, and proposals have addressed these federal appellate problems. Congress has responded to the problems by increasing the number of appellate judgeships, dividing the Fifth Circuit, authorizing a limited en banc procedure, and creating the United States Court of Appeals for the Federal Circuit. Apart from the latter, however, proposals aimed at basic restructuring of the appellate level have not progressed far in Congress.

This committee believes that after twenty years of sporadic attention and debate, the difficulties afflicting the federal appellate courts should be seriously addressed as a matter of high priority in the administration of justice. To that end, the committee offers this report with the hope that it will contribute to an enlightened discussion of the problems and of the measures that hold promise for meeting them. In the changed circumstances of the late twentieth century, lawyers and judges must think anew about the ways in which appellate courts are organized and in which they function, with Lord Macaulay's admonition in mind:

"Reform, that you may preserve." The views of individual committee members differ about some of the reforms discussed in this report, and indeed, some of the assertions in this preface. These views are set forth in the separate statement at the end of this report. Nevertheless, the committee as a whole believes that the American Bar Association should assume a position of constructive leadership in investigating the problems of the federal courts of appeals and in developing proposals for an appellate structure and process adequate to the needs of the times.

Respectfully submitted,

American Bar Association Standing Committee on Federal Judicial Improvements

Robert L. Chiesa
Frank A. Kaufman
Robert M. Landis
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James E. Noland
Maurice Rosenberg
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Robert S. Thompson
Daniel J. Meador, Chairman

March 1989

The committee expresses appreciation to its consultant, Professor George Rutherglen, for research and drafting assistance in the preparation of this report.

The United States Courts of Appeals:

Reexamining Structure and Process After a Century of Growth

The essential structure of the United States Courts of Appeals has not changed since these courts were created by the Evarts Act of 1891. In almost a century since then, the courts of appeals have expanded in every dimension. The number of circuits has increased from nine to thirteen and the authorized circuit judgeships from 22 to 168. But the most dramatic expansion has been in caseload--from less than 900 cases filed in 1892 to more than 36,000 filed in 1987.[1] In response to this increase, which is over five times greater than the increase in number of judges, it has also been necessary to augment the staff of the courts of appeals and to simplify the procedures for disposition of many of the appeals before them. Law clerks were unknown in the courts of appeals until the 1930's and staff attorneys did not appear until the 1970's. Now over 500 law clerks and 135 staff attorneys are assigned to these courts.[2] Before the 1960's, any party could obtain an argument on a nonfrivolous appeal in any of the circuits. Now only two circuits grant parties represented by counsel the right to oral argument and, in the twelve regional circuits as a whole, 45% of the cases decided after submission of the briefs are decided without oral argument.[3]

The vast changes in the courts of appeals have resulted in only minor changes in the structure in which they are embedded. An ever-increasing number of cases has been accommodated within a constant structure of regional circuits simply by increasing the number of circuits, increasing the number of judges within each circuit, increasing the staff which assists each judge, and increasing the means of deciding cases without full argument and opinion. The courts of appeals, for the first six or seven decades of their existence, succeeded admirably in fulfilling the original goals of the Evarts Act: to relieve the pressure on the docket of the Supreme Court and to create an effective forum to review the decisions of individual district judges. They replaced the circuit courts, which had functioned both as trial and appellate courts and which were staffed in large part by the district judges themselves. Since the decades of the Warren Court, however, the structure created by the Evarts Act has been subjected to increasing strain from the expansion of federal law and federal litigation. This strain has been felt at every level of the federal courts: in the increasing jurisdiction of the district courts; in the increasing rate of appeals to the courts of appeals; and in the increasing number of petitions for review in the Supreme Court, from the state courts as well as the lower federal courts. These demands upon the federal courts reflect not only the increasing quantity of federal litigation, but the increasing complexity and significance of federal law resulting both from congressional action and judicial decisions.

The problems posed by the increasing demands upon the federal judiciary have been the subject of a series of distinguished studies. In 1968, the American Bar Foundation sponsored a report, *Accommodating the Workload of the United States Courts of Appeals*, focused exclusively on the problems of these courts. It was followed by two reports, the first by the Study Group on the Case Load of the Supreme Court, led by Prof. Paul Freund, and the second by the Commission on Revision of the Federal Court Appellate System, chaired by Sen. Roman Hruska. Both of these reports proposed the creation of a National

Court of Appeals to relieve the burdens upon the Supreme Court. A Department of Justice Committee on Revision of the Federal Judicial System opposed the creation of a National Court of Appeals, but proposed various means to reduce the expanding jurisdiction of the federal district courts. The Advisory Council for Appellate Justice, chaired by Prof. Maurice Rosenberg, also conducted studies of the federal courts of appeals, but issued no final recommendations. Chief Justice Burger later proposed an alternative to the National Court of Appeals: an Intercircuit Tribunal composed of existing circuit judges sitting by designation. Of these reports, only those of the American Bar Foundation and the Hruska Commission recommend solutions to the problems faced by the courts of appeals.

This report seeks to redress this imbalance in attention and to return to the focus of the original report of the American Bar Foundation. It seeks to address the problems of the federal courts of appeals, without losing sight of the fact that they are problems of an entire system, which cannot be solved by examining each component of the system in isolation. The federal judicial system is a pyramid. For several decades, the base of this pyramid has been expanding with the increased number and types of cases in the federal district courts and the increased number of judges who staff those courts. Meanwhile, the apex of the pyramid has remained fairly constant. The Supreme Court has been able to decide less than 200 cases each year after full briefing and oral argument.[4] Much of the strain between an expanding base and a fixed apex must be absorbed in between, at the level of intermediate appellate review provided by the courts of appeals. Much of the strain could also be relieved, as the preceding reports have argued, by adding another level of appellate review near the apex through the creation of a National Court of Appeals, or by diminishing the base by restricting the jurisdiction of the federal district courts. A National Court of Appeals, if it were created, would reduce the demands on the courts of appeals to preserve a desirable degree of uniformity in federal law. And reduction of the jurisdiction of the federal district courts, for instance, by abolishing or curtailing diversity jurisdiction, would be accompanied by a reduction in appeals from those courts. This report does not address these proposals. It supposes, instead, that the distinctive problems of the courts of appeals may also require distinctive solutions.

What are these problems? The most obvious is the increasing number of federal appeals. It differs from the increasing caseload in the federal district courts both in the cause of the problem and the constraints upon a solution to it. The caseload of the courts of appeals has increased at a greater rate than the caseload of the district courts, reflecting a greater rate of appeal in many different areas of federal law. To take the most remarkable statistic, in 1987 nine times as many cases were filed in the courts of appeals as were filed in 1960 and over six times as many cases were decided after oral argument or submission on the briefs. By comparison, in the district courts, just over three times as many cases were filed in 1987 as in 1960.[5] This contrast is in part explicable by several clearly identifiable changes in the law, such as the extension to criminal defendants of the right to counsel on appeal and the increased scope of actions by state and federal prisoners, but it also reflects a general growth in appeal rates, which has been largest in such disparate areas as civil rights, social security, and antitrust.[6] The causes of this general increase in the rate of appeals has not been the subject of systematic investigation, but it is a feature of the federal judicial system which has persisted, although less dramatically, into the present decade. In 1987, 52% more cases were filed in the courts of appeals than were filed in 1980, while the corresponding figure for the district courts is only 43%.[7] If the present rate of growth of the appellate caseload--modest only by comparison ~~to~~ the explosive rate of the preceding decades--continues into the next decade, the caseload of the courts of appeals will more than double in the 15 years from 1980 to 1995. Moreover, changes in the law might well increase the rate of appeal still further. For instance, the recently promulgated Federal Sentencing Guidelines allow appellate review of sentences in criminal cases, including the great majority of cases in which the defendant has pleaded guilty and there were formerly no grounds for appeal.

The response to increases in caseload in the district courts and in the courts of appeals has been similar in many respects: increasing the number of judges, increasing the number of staff, and increasing the alternatives to the traditional procedure of deciding cases after full oral argument by published opinion. If some proposals for reform are implemented, decreasing the jurisdiction of the district courts could be added to this list. Even these responses to increased caseload have different consequences for the courts of appeals and the district courts. For instance, the use of magistrates in the courts of appeals creates peculiar difficulties not presented by the role of magistrates in the district courts. In the district courts, magistrates generally rule on an issue before it reaches a federal judge, but if they were used at all extensively in the courts of appeals, they would be ruling on issues already addressed and decided by a federal district judge. Moreover, some reforms in the district courts might actually increase the caseload of the courts of appeals. For instance, most proposals to shift litigation from the federal courts to administrative agencies require some degree of judicial review, typically in the courts of appeals. These proposals would do little or nothing to relieve the present caseload from this source, which made up over 10% of the appeals filed in 1987.[8] This segment of the appellate caseload could be reduced only by improving the capacity for appellate review in the administrative agencies themselves or by creating a court under Article I to review the decisions of administrative agencies. Some aspects of this choice--between appellate review in Article I courts and judicial review in Article III courts--are also discussed later in this report.

The response to increasing caseload by increasing the number of judges and staff and increasing the proportion of cases decided without oral argument has generated a second set of problems concerned with the quality and uniformity of justice on appeal. The side effects of the standard cures for increasing caseload may prove to be as serious as the original disease. Adding judges to the district courts may be constrained by budgetary and political considerations and, most importantly, considerations of prestige in preserving the status of the office of federal district judge. Adding judges to the courts of appeals is subject to an additional constraint: preserving the coherence and unity of the courts of appeals so that each can speak with a single voice in declaring and applying federal law. Over the long term, circuits with 30 or 40 judges pose different problems of organization and structure than the existing regional circuits. In the immediate future, it is necessary to investigate the problems created by the solutions for increasing caseload.

The most widely cited problem concerns inconsistencies or conflicts among the circuits, disrupting the national uniformity of federal law. It has been the subject of repeated dissents from denial of certiorari by Justice White. This problem cannot be effectively addressed by regional circuits. To the extent that these circuits are independent and equal, with jurisdiction over the same subject matter, their decisions create the possibility of conflict. This problem might be alleviated by nonregional appellate courts whose jurisdiction is defined by subject matter, like the Court of

Appeals for the Federal Circuit. The need for national uniformity varies across different issues of federal law and the desirability of courts defined by subject matter depends upon a wide range of other variables, such as the ease of identifying cases within its jurisdiction and the variety and interest of the issues its judges would decide. If these constraints can be satisfied, nonregional courts of appeals promise to increase both the uniformity and the efficiency of decisions within their jurisdiction.

The growth of regional circuits, not in number of circuits, but in number of judges, poses a related problem of conflicts within each circuit. The number of regional circuits is now near its maximum, at least on the widely shared assumptions that each state must fall entirely within one circuit and that each circuit must consist of at least three adjoining states. Some states, notably California and New York, account for a major part of the cases within a single circuit. As proposals for division of the Ninth Circuit have revealed, subdividing the circuits without subdividing states would not result in an even distribution of cases among the regional circuits. Given the stated assumptions, continued growth of the number of judges in each regional circuit appears to be inevitable, absent a striking change in the appellate caseload or the creation of circuits whose jurisdiction is defined by subject matter. The growth of regional circuits, in turn, multiplies the opportunity for conflicts among the decisions of three-judge panels within each circuit, particularly when these panels are partly composed, as they increasingly are, of senior circuit judges, district judges, and judges from other circuits. At the same time, the increasing size of the circuits also increases the cost of resolving intracircuit conflicts through rehearing cases en banc. It increases the number of judges who must sit en banc and it multiplies the time required for deliberation among them, unless a circuit adopts the procedure for limited en banc decisions now in use in the

Ninth Circuit. Unlike conflicts among the circuits, conflicts within each circuit are most effectively resolved by reforms directed to the courts of appeals themselves.

The procedures for deciding cases without oral argument or published opinion, and particularly the role of law clerks and staff attorneys in these cases, have caused growing concern that the courts of appeals rely too heavily upon bureaucratic procedures instead of the attention of individual judges to individual cases. The need to resort to these procedures is just another consequence of the growth of appellate caseload without a corresponding increase in the number of appellate judges. From 1960 to 1987, the caseload of each judge nearly tripled, from 39 cases decided after submission on the briefs or oral argument for each authorized judgeship in 1960, to 119 in 1987.[9] This increase in quantity has been accompanied by an increase in complexity, at least as reflected in the increased length of trials in the district courts and in the increased number of signed majority opinions per circuit judge, from 29 opinions in 1960 to 41 in 1987.[10] To cope with this increase in the number of cases, and in the number of difficult cases, most of the circuits have adopted screening procedures to separate the easy cases that can be decided expeditiously from the difficult cases that require a disproportionate share of the judges' attention. Even in the Second Circuit, one of two circuits that allows oral argument in almost all cases in which the appellant is represented by counsel, the time for argument can be cut short by the presiding judge.[11] The Second Circuit has also implemented a Civil Appeals Management Plan, in which staff members encourage settlement of appeals before oral argument. The question is not whether some cases should be screened, but how.

Any proposals for modifying the structure and procedures of the courts of appeals must be assessed, not only against the problems confronting those courts, but against the functions that they serve. The Evarts Act, which created the courts of appeals, also defined their essential functions: to relieve the pressure upon the docket of the Supreme Court and to strengthen appellate review and control over the decisions of individual district judges. The second of these functions, if not the first, requires three circuit judges to supervise the considerable power exercised by a single federal district judge. It is apparent that this function is compromised if it is effectively delegated to nonjudicial staff, or even if it is delegated to a single circuit judge. In these circumstances, many of the benefits of reconsideration by a panel of judges are lost. It is equally true, but less frequently noticed, that this function is also threatened when the luck of the draw results in a panel of judges not representative of the judges on the entire circuit. In these circumstances, the idiosyncrasies of a single district judge may not be checked, but only replaced, by the idiosyncrasies of a panel of three judges.

The function of the courts of appeals in supervising the district judges within a circuit thus depends upon preserving the uniformity and coherence of federal law, if not on a national level, then within each circuit itself. This function requires more than simple insistence upon the application of settled law. It requires the courts to maintain a degree of continuity in a developing body of federal law, enough to assure that litigants receive equal treatment, but not so much that the growth of the law is stultified. This function is threatened by the increasing size of the circuits, perhaps due more to the decreasing opportunities for personal communication among judges on a large and busy court than to the increasing risk of intracircuit conflicts. This problem has been the subject only of sporadic empirical investigation. As the circuits increase in number of judges, the need for empirical evidence of the variability of decisions among different panels on similar issues will become more and more acute. In the absence of such evidence, the maximum number of judges who can sit on a single circuit will remain a matter of guesswork, as will the effectiveness of different procedures for reconciling their decisions.

The proposals advanced in this report seek to preserve the essential functions of the courts of appeals defined by the Evarts Act. But in order to preserve, it is necessary to change. These proposals are designed to modify to a limited extent the structure of the federal courts established by that act almost 100 years ago. They are not advanced as proposals to abandon that structure entirely or as panaceas for all the problems that confront the federal courts today. As others have emphasized, a broad array of reforms is necessary to preserve and enhance the distinctive role of the federal courts in our society: in protecting individual rights and liberties, in preserving democratic processes of government, and in implementing and overseeing federal legislative programs. A reexamination of the structure of the federal courts of appeals is only a part, but an essential part, of any such comprehensive program of reform.

I. Non-Regional Circuits Defined by Subject Matter

The Evarts Act followed the model of the old circuit courts in creating regional courts of appeals whose jurisdiction was defined geographically. Courts of appeals whose jurisdiction is defined by subject matter depart from this structure, but such courts are not unprecedented. One such court already exists, the Court of Appeals for the Federal Circuit, which has exclusive appellate jurisdiction over cases involving federal contracts and patents, cases from the Claims Court and the recently created Court of Veterans' Appeals, and various administrative proceedings concerned with patents, trademarks, the federal civil service laws, and international trade.[12] The Temporary Emergency Court of Appeals has also exercised nationwide jurisdiction under a variety of different statutes concerned with price controls and, more recently, energy regulation. Despite its name, this temporary court has remained in existence since 1971. Its predecessor, the Emergency Court of Appeals, also persisted for two decades after its creation during World War II.[13] A far more important court, the District of Columbia Circuit, resembles a court whose jurisdiction is defined by subject matter in the preponderance of administrative appeals on its docket, accounting for 42% of cases filed and 55% of cases pending in 1987.[14] In some kinds of administrative cases, notably those involving the Federal Communications Commission, the D.C. Circuit effectively exercises nearly exclusive jurisdiction.[15] A less prominent court, created under Article I, the Court of Military Appeals, exercises nationwide jurisdiction over courts martial.[16] As this brief catalogue reveals, courts defined by subject matter have been the exception, not the rule, in the federal judicial system. The structure of our federal system has lent itself to regionally defined circuits, which imitate the regional distribution of authority to the states and the regional representation of the states in Congress. Through the process of confirmation in the Senate, for instance, individual senators have had a strong voice in the appointment of federal judges from their state. For these reasons, the regional circuits have continued to be the norm in the federal system, even after the circuit courts themselves were abolished. These courts are often spoken of as courts of general jurisdiction (although no federal court is really a court of general jurisdiction), but they could as well be considered courts of specialized geographical jurisdiction. Characterizing their jurisdiction in this way raises a fundamental question: What cases are appropriate for regional appellate review, as opposed to centralized national appellate review?

The traditional answer to this question has been that almost all cases are appropriate for review in the regional circuits by judges who decide cases across almost the entire breadth of federal law, as well as issues of state law in cases within the diversity jurisdiction. The volume and variety of contemporary federal litigation, however, cast doubt on the traditional assumption that all cases are appropriate for initial appellate review by a regional court. A federal circuit judge today decides a vastly wider range of cases than Judge Learned Hand, when he was appointed to the Second Circuit in 1924 and even when he retired in 1951. All of the New Deal legislation followed his appointment as a circuit judge and most of the modern civil rights, consumer, and environmental legislation and the expansive interpretation of constitutional rights occurred after he had retired.[17]

Of course, not all cases within the jurisdiction of the federal courts require review by a single, national court. Diversity cases typically raise questions of state law suitable for regional review. Likewise, many federal claims depend heavily on state law, for instance, habeas corpus claims by state prisoners, claims asserting the unconstitutionality of state law, and cases likely to involve pendent claims under state law, such as those under the antitrust and securities laws. Other federal claims raise matters of intense local concern, even if they involve no issues of state law. Claims involving school desegregation, reapportionment, or the environment can be of overriding importance to state and local officials and the citizens they represent.

By contrast, other federal claims present a special need for national uniformity. Federal law must be uniform across the nation, at least over the long term, if it is to have any distinctive advantage over state law. Some federal questions also require uniform decisions even over the short term. These claims typically involve federal laws administered by a single, national agency, such as the Internal Revenue Code, the Federal Communications Act, and the National Labor Relations Act. There appears to be little logic in a scheme for nationwide administrative enforcement coupled with regional appellate review. It invites forum shopping for the court of appeals with the most favorable law and it creates conflicts among the circuits and with administrative agencies that invite review by the Supreme Court. These problems seem to be most severe in cases of national significance, in which the stakes are highest.[18] In general, but particularly in these cases, the reasons for granting authority to a single, national administrative agency are exactly the same as the reasons for avoiding conflicting regional appellate review.

The advantages of national appellate review in these cases are several. To a degree, it reduces the pressure on the Supreme Court to grant certiorari in a case only in order to resolve conflicts among the regional circuits. The principal benefit of national appellate review lies elsewhere, however. Particularly if such review is confined to only a few areas of federal law, its effect upon the docket of the Supreme Court will be correspondingly limited. The principal benefit lies in eliminating conflict between multiple forums for judicial review and a single administrative agency. This, in turn, promotes equitable administration of the laws, not just in adjudication and enforcement by the agency, but in compliance and planning by those within its jurisdiction.

The most familiar and fully debated proposal for a national appellate court is for a single court for tax appeals. The existing procedure in the great majority of tax cases allows a taxpayer to choose among three different forums for trial with different procedures and different rights of appeal. A taxpayer can dispute a deficiency assessed by the Internal Revenue Service in the Tax Court, an administrative court created under Article I. The taxpayer can file a case in the Tax Court without paying the deficiency. After a hearing before a single judge, the case may be reviewed by the full court, consisting of 19 judges, and an appeal can be taken from the decision of the court to the circuit where the taxpayer resides, or if the taxpayer is a corporation, where it has its principal place of business. Alternatively, the taxpayer can commence a refund suit in the Claims Court or in federal district court. The Claims Court is an Article I court, like the Tax Court, in which there is no right to jury trial. Appeals from the Claims Court are to the Court of Appeals for the Federal Circuit. Refund actions in the federal district courts, by contrast, may be tried before a jury. These actions may be brought in the district where the taxpayer resides or has his principal place of business and an appeal must be taken to the regional circuit which encompasses the district. In 1987, almost two-thirds of tax appeals were from the Tax Court or the Claims Court and only about a third from the district courts, totaling about 750 cases altogether.[19] These cases made up just over 2% of the cases filed in the courts of appeals.

As these statistics confirm, the argument for a National Court of Tax Appeals does not respond to the burden that tax litigation places upon the courts of appeals. On the contrary, it rests in part on the need to create an Article III court with a sufficient volume of tax appeals to enable it to administer and develop the federal tax law coherently and effectively. Many circuit judges participate in only a handful of tax appeals annually, so few that they cannot gain a broad view of the whole complex body of federal tax law. Indeed, the objective of concentrating tax appeals in a single, national forum could be accomplished by vesting such jurisdiction in the Court of Appeals for the Federal Circuit, which already decides tax appeals from the Claims Court.

The argument for a single, national forum for tax appeals also rests on the need to eliminate conflicts among the courts of appeals and conflicts between those courts and the Tax Court, which effectively functions as an Article I appellate court in those cases selected for review by its chief judge. At first, the Tax Court did not acquiesce in contrary decisions of the courts of appeals, on the ground that it was a national court and they were regional courts. It has subsequently held itself bound by the law of the circuit where the taxpayer resides and could seek review. This still leaves taxpayers the option of commencing a refund suit in the Claims Court with appellate review in the Federal Circuit, if the law of that circuit is more favorable than the law of the circuit of residence or the law of the Tax Court. Moreover, it results in different dispositions of identical issues by the Tax Court solely on the ground that taxpayers are from different circuits. Although the Supreme Court or Congress could resolve these differences among the circuits, some conflicts on significant issues have remained unresolved by these institutions for one or two decades. In the meantime, of course, the volume of taxes paid or unpaid because of the conflict continues to mount.

The principal argument advanced in opposition to a National Court of Tax Appeals is that its members would be narrow specialists who might, because of prior experience or the process of selection, develop a bias in favor of the government. The concern with specialization, like the concerns in other areas of federal law, underestimates the growth of tax law in scope, complexity, and intellectual richness. A judge on a regional court of appeals would know more about other areas of federal law than a judge on a National Court of Tax Appeals, but this judge would also be very likely to know less about the interrelationship among the complex provisions of the Internal Revenue Code and its implementing regulations, let alone how these have been affected by recent amendments. Apart from protest tax litigation, this kind of expertise is particularly necessary in the difficult cases that are likely to be the subject of an appeal: those that present questions of law that cannot be resolved by reference to a governing statute, regulation, or precedent, and that have not proved amenable to settlement through administrative procedures within the Internal Revenue Service. Appointments to a National Court of Tax Appeals would be unlikely to suffer for lack of qualified candidates. The field of federal tax law continues to attract some of the most capable lawyers in a variety of roles, as private practitioners, public officials, and legal scholars. The prestige of this court would be enhanced by the combination of Article III status and nationwide jurisdiction. This new court, as seems desirable for any new federal appellate court, should be integrated into the existing structure of the courts of appeals; its judges would be United States circuit judges eligible to sit by designation in the other circuits, with judges from other circuits eligible to sit by designation on it. Its nationwide jurisdiction would assure that it effectively functioned as a court of last resort on many of the tax questions that came before it. The handful of tax cases that the Supreme Court has decided each term, from three to six cases with full argument and opinion, would likely decrease still further if the National Court of Tax Appeals proved to be at all successful, leaving its decisions on statutory issues subject to modification only by Congress. The risk that judges appointed to this court would be drawn disproportionately from the government, particularly from the Internal Revenue Service, could be counteracted in the confirmation process. Taxation is a highly visible subject on which diverse interest groups, independent of the government, regularly exert strong political pressure. Suitable procedures and informal understandings could be developed by the Senate as a whole or by its Judiciary Committee to assure balanced presentation of views on different nominees and a broadly representative group of judges on the court.

A variety of details of the court's structure and administration could be worked out, depending on its caseload and the allocation of cases among the Tax Court, the Claims Court, and the federal district courts. As most proposals for this court have suggested, its members could sit in panels in different cities, for the convenience of taxpayers and their lawyers. Appeals to the court would lie from every case concerned with liability for federal taxes collected by the Internal Revenue Service, including actions initiated by the United States, and to actions collateral to civil tax proceedings, such as those to enforce summonses issued by the Internal Revenue Service. All such appeals should be easy to identify since tax litigation invariably is the subject of proceedings independent of other civil actions. Criminal tax cases, like other federal criminal cases, would remain reviewable in the regional circuits. Procedural issues in cases from the federal district courts could be resolved according to the law of the circuit in which the district court was located, as the Court of Appeals for the Federal Circuit now does with procedural issues in patent cases.

If these arguments were thought insufficient to overcome objections to a National Court of Tax Appeals on the ground that its jurisdiction was too narrow, jurisdiction over tax appeals could instead be added to that of the Court of Appeals for the Federal Circuit. This step would reduce or eliminate concerns that the judges who sat on tax appeals were too specialized and too likely to be captured by special interests, particularly the Treasury's interest in tax collection. It would also diminish concerns over the fluctuating number of tax appeals, which might leave a National Court of Tax Appeals either overwhelmed or underemployed. On the other hand, these benefits would be gained only by decreasing the proportion of judges on the court with previous experience in some aspect of tax law. If, as seems likely, such judges were unevenly represented on the panels of a larger court, the decisions of the court in tax cases might show a greater tendency to conflict than the decisions of a smaller court with narrower jurisdiction. Such questions, essentially of implementation, deserve further study, but however they are resolved, they do not detract from the basic arguments for a national forum for tax appeals.

Expanding upon the same model, and on the actual experience of the D.C. Circuit, other administrative programs could form the subject matter for a single court of appeals. Unlike a National Court of Tax Appeals, a national administrative court would not have its jurisdiction confined to a single subject. On the other hand, its jurisdiction should not extend to every appeal from administrative proceedings, since these span a vast range from appellate review of district court decisions, which in turn review awards of Social Security benefits, to judicial review of rates set by the Federal Energy Regulatory Commission and air quality standards issued by the Environmental Protection Agency. The contrast between these two extremes of administrative action--decisions affecting a single individual and agency action affecting broadly defined groups of people--suggests that they present two different problems of appellate review which might require two different solutions.

Appellate review of individualized decisions primarily serves as a safeguard against erroneous or biased decisions by an administrative agency or an administrative law judge. These cases do not usually require judges to make new law, but to preserve the coherence and impartial application of existing law. Although judicial review remains necessary, it need not be placed in the first instance in the courts of appeals. In the few cases in which judicial review requires additional evidence to be taken, as under the Freedom of Information Act, jurisdiction should remain in the district courts, with ordinary appellate review by the courts of appeals. In cases which involve only judicial review on the administrative record, an appeal within the agency itself might resolve many routine cases. Most administrative agencies already provide their own mechanisms for appellate review. Alternatively, if there were doubts about the adequacy and impartiality of the agency's internal procedures, a court could be created under Article I with jurisdiction to review the decisions of several different agencies. Jurisdiction beyond a single agency would give it broader constituencies which would not press a narrow range of interests, either in proceedings in the court or in the process of appointing judges to it. An Article I court to review Social Security awards, for instance, has been endorsed by the Judicial Conference and its jurisdiction could be extended to other cases that essentially involve only review of the administrative record, such as those from the Benefits Review Board, the Office of Workers Compensation Program, the Railroad Retirement Board, and the Veterans' Administration.

An Article I court or internal agency review, designed with safeguards against political manipulation, would not eliminate the need for appellate review by Article III courts. Both the jurisdiction of an Article I court and the terms of judicial review of its decisions would depend heavily on the character of the administrative decisions within its jurisdiction. Extensive review by an Article I court, combined with limited review by an Article III court, could be achieved in a variety of ways: by limits on the jurisdiction of the Article III court, by judicial deference to administrative decisions on questions of fact or law, or by the formulation of flexible or rigid standards of substantive law. As the recent controversy over disability claims under the Social Security Act shows, the distinction between cases that require searching review by an Article III court, and those that do not, cannot be drawn in the abstract.

However it is achieved, a division of appellate labor between Article I and Article III courts would have several advantages. It would focus the attention of the courts of appeals on cases of general importance, but allow expansion of federal administrative programs without greatly increasing the burden on the federal judiciary. It would also facilitate proposals, often advanced, for transferring many of the routine cases within the jurisdiction of the federal district courts to administrative agencies. By increasing appellate capacity outside the federal courts, it would ensure that a reduction in the caseload of the district courts did not result in an increase in the caseload of the courts of appeals.

By contrast, major agency decisions or comprehensive regulations that affect broad groups in our society pose quite different problems for appellate review. These are plainly important enough to deserve the attention of Article III judges without a preliminary decision by an Article I court. They also tend to be sufficiently complicated and of sufficient national significance to be allocated to a single court of appeals. The present, disproportionate appearance of such cases on the docket of the D.C. Circuit approximates to a degree the consequences of a reform along these lines. One study has estimated that 45% of all "high burden agency cases" are filed in the D.C. Circuit, including review of both agency adjudications and rulemaking, and indeed, some statutes already create exclusive venue in that court.[20]

A modest expansion of these statutes would transform the D.C. Circuit into a court whose jurisdiction was largely defined by subject matter. For instance, concentrating review of all cases from the Federal Communications Commission, the Federal Labor Relations Authority, and the Occupational Safety and Health Administration, would do little more than recognize the existing distribution of these cases. The decisions of other agencies, such as the Federal Energy Regulatory Commission, could be reviewed exclusively in the D.C. Circuit, although most of these cases are now divided, almost evenly, between that court and the Fifth Circuit.[21] The desirability of reviewing cases from a particular agency in a single court depends on factors other than the significance of the issues that they present, such as the convenience of litigation in a centralized location and the degree of local or regional interest in the outcome. The experience of the D.C. Circuit suggests that a court need not have its jurisdiction defined only in terms of subject matter or in terms exclusive of all other courts. A mix of jurisdiction, exclusive on some subjects and concurrent on others, may accord best with our traditions of judicial review but still provide for uniform decisions where they are most needed. Indeed, instead of creating an entirely new court, the venue for reviewing certain administrative actions might be restricted to a single regional circuit. Such a decision would require the absence of any distinctive regional interest in resolving the cases with restricted venue.

Again, the details of the jurisdiction are not as important as the principle: that cases of nationwide significance should be subject to review by a single, national forum. As with centralized review of tax appeals, the benefits from nationwide administrative review would not lie principally in reducing the caseload of the regional circuits, although the collective effect of such a jurisdictional shift would not be insignificant. Instead, the principal benefit would lie in preserving nationwide uniformity in a program administered by a single, national agency. These benefits could be obtained by restricting the venue of judicial review of agency action, as is now done in some environmental legislation. There is no need for an all-or-nothing solution, even within a single statutory program, provided the cases fall easily within the jurisdiction of one court of appeals or another. A successful experiment with a court of appeals with jurisdiction over administrative claims, like the ongoing experience with the D.C. Circuit, would also allow room for expansion of appellate capacity with the creation of new federal programs. The capacity of the courts of appeals to review complex administrative proceedings could be expanded simply by expanding the number of judges on such a court. The continuity of decisionmakers would assure a degree of coherence within the court and the court's nationwide jurisdiction would assure national uniformity without putting additional pressure on the docket of the Supreme Court.

A court with its jurisdiction defined by subject matter could also make more efficient and fairer use of other devices to relieve congestion in the courts of appeals. The work of law clerks and central staff attorneys could be more closely supervised by judges already familiar with a complex body of law. These judges would also have a better feel for the cases that deserved full treatment through oral argument and published opinions. This form of expertise might explain the otherwise startling statistic that the D.C. Circuit reverses or remands more than half of the cases in which it does not hear argument, often because they follow or are consolidated with a lead case decided after full argument and deliberation.[22] In such cases, decided by opinion after argument, judges who are already familiar with the law are also able to reach better decisions, perhaps also in a shorter period of time.

The very advantages of courts defined by subject matter have caused concern that they represent an unwarranted departure from the American tradition of regional courts of general jurisdiction. Such courts might wield their expertise too forcefully, without the checks provided by local political power over appointments to regional courts of appeals. Regional review may be regarded as a check on centralized administrative decisions. The brief and unfortunate history of the Commerce Court exemplifies the fate of courts whose jurisdiction is confined to a single, narrow subject, such as review of orders of the Interstate Commerce Commission, and which become identified with a single interest group.[23] The dominant role of the D.C. Circuit on issues of administrative law suggests that courts whose jurisdiction encompasses a range of subjects resist capture by any single interest group or coalition. If the argument for regional review is valid, it must depend on the characteristics of particular cases, not on a general judgment that diversity in the law is good for its own sake. Although some questions of law are best explored through the development of case law in different circuits, these questions are not likely to be assigned in the first instance to a single administrative agency with nationwide jurisdiction.

National courts of appeals, like a National Court of Tax Appeals, might also be overly susceptible to centralized federal interests, both in appointments and in decisions. The D.C. Circuit sits only in Washington, D.C. and the Federal Circuit is based there, although it occasionally sits elsewhere. The history of these courts has been heavily influenced by the special status of the District of Columbia and by the special procedures for litigation against the Federal Government. The geographical concentration of these courts raises several problems, the least of which is inconvenience for litigants. Locating a court with nationwide jurisdiction in Washington tends to limit the bar that practices before that court, although this tendency is much less marked in the present age of national law firms and frequent air travel.

The Senate could also establish procedures for appointment of judges to courts whose jurisdiction is largely defined by subject matter, as suggested earlier for appointments to a National Court of Tax Appeals. Indirect constraints should also be developed, principally by extending the jurisdiction of these courts over a range of different subjects. They need not be treated as narrowly specialized courts which are the opposite of the regional circuits in every respect. The jurisdiction of courts defined by subject matter should be broad enough both to avoid undue influence from special interests and to attract judges of the highest calibre. The steady expansion and growing complexity of federal law assures a supply of interesting subjects for such courts, even if they constitute less than the entire length and breadth of federal law. Their jurisdiction might also include some subjects over which they exercise concurrent jurisdiction with the regional circuits on the model of the D.C. Circuit. The record of appointments to that court indicates that courts defined by subject matter can attract a diverse group of judges from among the best lawyers around the country. As a matter simply of judicial administration, a court with jurisdiction over a range of subjects will also experience fewer fluctuations in its overall caseload as particular kinds of cases rise and fall in volume.

The principal argument for all of these proposals, for a national forum for tax appeals and for an Article I and an Article III court to hear appeals from administrative proceedings, is that they will promote uniformity in decisions, where uniformity is particularly necessary. If these courts can fulfill this promise over the short term, then they have the potential for gradually expanding the capacity of the courts of appeals over the long term. These courts can themselves be expanded without the threat to the coherence of federal law posed by an increasing number of ever larger circuits. They can also be used as the model for other courts whose jurisdiction is defined by subject matter, as other areas of federal law are identified as suitable for a nationwide circuit.

II. Modifying the Internal Structure of the Circuits

Since the Evarts Act, and even before, the regional circuits have been the principal vehicle for appellate review in the federal courts. Even with the gradual and modest development of courts defined by subject matter, regional courts of appeals will remain important appellate forums for handling a wide variety of issues. They are not likely to be replaced in the foreseeable future, but neither are they likely to increase in number, with the possible exception of a division of the Ninth Circuit. Even proposals for dividing the Ninth Circuit, although they might be justified on grounds of administration and reducing the travel of judges and attorneys, must confront the fact that over 45% of the cases within the present circuit now come from California alone.[24] The continued internal growth of the circuits is the most likely response to the continued increase in federal appeals.

This response brings with it problems of its own. These can all be classified under the heading of intracircuit conflicts. Like conflicts between the circuits, conflicts within the circuits can be resolved only by courts superior to the three-judge panels that normally decide federal appeals. Over half of the appellate capacity to review decisions of three-judge panels comes from the Supreme Court, which decides more cases appealed from the federal courts than all the circuits sitting en banc.[25] A National Court of Appeals would probably reduce intracircuit conflicts, or at least reduce their significance, by reducing intercircuit conflicts. Conversely, the failure to create a National Court of Appeals leaves both problems to be resolved by other means.

There are other reasons to believe that the problem of conflicts within the circuits is large and growing. Assuming that the law within each circuit is fairly uniform, the opportunities for conflict are limited by the number of circuits, which stands now at thirteen. By contrast, the number of combinations of three-judge panels within a circuit increases more than exponentially with the number of judges. So, for example, an average circuit of 12 judges can be combined into 220 different three-judge panels. A modest increase of three judges, to a total of 15, increases the number of different panels to 455 and a further increase to 28, the number of judges on the Ninth Circuit, increases the number of panels to 3,276. These figures are a significant underestimate because they do not count panels which include senior circuit judges, visiting judges from other circuits, or district judges sitting by designation. Altogether, these judges accounted for 17% of judicial participation in panel decisions in 1987.[26] The increase in the number of different panels sitting within each circuit comes at the same time as the increase in the caseload itself and makes it more difficult for each judge to keep abreast of other decisions within the circuit in order to avoid conflicts.

The adverse consequences of intracircuit conflicts are likely to be greater than those of intercircuit conflicts, partly because there is less to be gained from them. Conflicts among the circuits might be valuable because they reveal the consequences of taking one position rather than another, but the inability of a circuit to adhere to a single position obscures what those consequences are. Intracircuit conflicts are also more likely to escape notice than intercircuit conflicts. A panel opinion can be fairly frank about rejecting or interpreting narrowly and unsympathetically the decisions of another circuit. It is likely to be far more circumspect in its treatment of an earlier decision of another panel of the same circuit, which would otherwise constitute binding authority.

Unlike conflicts among the circuits, conflicts within the circuits have received little systematic study. These conflicts deserve at least equal attention because they are both more likely and less visible. They pose the greatest problem in the largest circuits, at least judging by commentary and criticism of the practices and opinions of the Ninth Circuit.[27] For instance, a survey of district judges and lawyers reported that 40% of the judges and 31% of the attorneys disagreed with the statement, "Ninth Circuit opinions generally adhere to law announced in earlier opinions." And a majority of both groups, 68% of the judges and 59% of the attorneys, disagreed with the further statement, "There is consistency between panels considering the same issue."[28] Survey evidence, preliminary though it may be, justifies further research into the extent of intracircuit conflicts and possible ways of reducing their occurrence.

A. Limited En Banc Decisions

The principal device for eliminating conflicts within a circuit, decisions en banc, also comes under increasing strain with increasing numbers of judges in each circuit. The need for these decisions increases with the number of judges in a circuit, but so does the cost. Just the number of judges participating in the decision increases, not to mention the complexity of the interactions between them. En banc decisions have not fulfilled a broader role in the federal judicial system because the cost of these procedures discourages judges from taking cases en banc in the first place. The participation of all the judges within a circuit in en banc decisions has led, and in most of the circuits, still leads, to massive circulations of correspondence among judges, oral arguments in which a large group of judges cannot effectively question counsel, and decisions dominated by multiple concurring opinions. Confronted with the inefficiencies of en banc procedures, most judges have naturally avoided taking cases en banc. In recent years at least, it is somewhat more likely that a federal issue will be resolved by the Supreme Court than by a circuit court sitting en banc.

For this reason, Congress enacted legislation, similar to a proposal of the Hruska Commission, authorizing circuits with more than 15 judges to conduct limited en banc hearings before fewer than all of the active judges on the circuit.[29] This procedure has been adopted only by the Ninth Circuit, whose limited en banc decisions are made by the Chief Judge and ten randomly chosen circuit judges. In the three years following adoption of this procedure, the court doubled the number of cases that it decided en banc.[30] If limited en banc decisions prove successful in the Ninth Circuit, they provide a model for using this device in other circuits. The limited en banc procedure adopted by the Ninth Circuit provides a nearly ideal setting for evaluating this procedure and comparing it to the en banc procedures in other circuits.

The principal questions raised by limited en banc procedures concern the number of judges who should sit in such cases and the number who should decide to take a case en banc. Both numbers must be large enough to establish precedents that are effectively binding upon the circuit, but not so large that the limited en banc procedure costs about as much as the ordinary en banc procedure. Some critics have opposed these procedures precisely because fewer than all the judges on a circuit constitute an arbitrarily defined court without inherent authority.[31] These objections might be met by insisting that at least seven judges participate in a limited en banc proceeding, so that a majority of four would be required to overrule a unanimous panel decision by three judges. The judges sitting in a limited en banc would also be bound by prior limited en banc decisions, in order to avoid conflicts at this level within the circuit which could only be resolved by an ordinary en banc decision. Probably no more than eleven judges should sit in a limited en banc proceeding, since thirteen judges is not much lower than the number of judges on the other circuits, and indeed exceeds the number in several. No appellate court in this country regularly sits with more than nine members, the number of justices on the Supreme Court. Moreover, it is often asserted, although without empirical confirmation, that more than nine judges cannot effectively deliberate over a single decision. Courts of this size are usually compared to legislative committees. Nevertheless, the Ninth Circuit has chosen eleven for the number of judges in its limited en banc proceedings.

Behind the objections to the number of judges who sit on a limited en banc court lies a justifiable concern with preserving the equal status of all circuit judges and a continuing uneasiness with en banc procedures as a kind of mezzanine level in the federal judicial system between the courts of appeals and the Supreme Court. Any reform of the federal courts must preserve the status and prestige of the federal judiciary. Such concerns contributed to the opposition to a National Court of Appeals which, in effect, would have demoted circuit judges one step in the judicial hierarchy. These concerns could be met by randomly selecting circuit judges to sit on a limited en banc court, as the Ninth Circuit now does. A related concern, over the stability of limited en banc decisions, could be met by requiring all active judges to vote on whether to take a case to a limited en banc, as is also done in the Ninth Circuit.[32] These procedures would preserve the equal status of all circuit judges, at least over the long term, but they would not eliminate the considerable cost of decisions to take cases en banc. Even if the experience of the Ninth Circuit demonstrates that limited en banc procedures are a useful addition to the internal structure of the circuits, they are not likely to eliminate the growing risk of intracircuit conflicts resulting from the increased number of judges within each circuit.

B. Case Assignment by Subject Matter.

An alternative device for reducing the risk of intracircuit conflicts is to assign cases by subject matter, first put forward by the American Bar Foundation report and by the director of its study group, Prof. Carrington.[33] Instead of assigning cases randomly among panels of judges chosen randomly, cases on specified subjects could be assigned to panels chosen from a small pool of judges, say five or six, whose membership rotated slowly among all the judges of the circuit. In this manner, a circuit composed of many judges could decide cases within particular subject areas as if it were a circuit of five or six judges. Unlike full en banc decisions, assignment of cases by subject matter becomes more feasible, not less, as the size of a circuit increases and both the number of judges and the number of cases available for assignment by subject matter increases as well. Like other devices for assigning cases by subject matter, it allows judges to achieve a degree of familiarity with issues that might otherwise come before them only infrequently. Internal organization of the circuits by subject matter is also a useful experimental device that can be altered and evaluated according to the different mix of cases in different circuits. It constitutes a promising compromise between our tradition of regional circuits and the desirability of courts whose jurisdiction is defined by subject matter.

Assignment of cases to panels according to subject matter, like defining the jurisdiction of an entire court by subject matter, need not result in a narrowly specialized caseload. As pointed out above, several reasons support a mix of different cases, among them, providing judges with a variety of interesting problems and accommodating fluctuations in the caseload in different subjects. For panels defined by subject matter a further reason can be added: the power to assign a case should not become, in effect, the power to decide it. For this reason also, the pool of judges from which these panels are drawn should include five or six judges, so that its decisions are more representative of the views of the entire circuit than the decisions of a single three-judge panel. An increased pool of judges would permit these judges to decide a wider range of cases with a greater variety of issues. The judges within the pool could also be authorized to decide cases by a kind of en banc procedure, in which all of them participated. They could also refer cases for en banc consideration by the court as a whole.

As with limited en banc proceedings, the manner of selecting judges for subject-matter panels must preserve the equal status of circuit judges. The principle of random assignment of judges should be retained, but broken down into two stages: first, random selection of judges to serve on a subject-matter pool, and second, random selection of judges from the pool to serve on a subject-matter panel. To preserve continuity of membership, judges could be gradually rotated into and out of the pools. The rate of rotation, for instance, one judge each year, depends both upon the degree of stability needed for this device to function effectively and the range of issues that judges within the pool confront. Again, a broader range of subjects would sustain a lower rate of rotation. Alternatively, judges could be assigned only a fraction of their cases from the subject-matter panels, for instance, one third. This alternative has the advantage of providing increased uniformity over subjects assigned to the panels, but allowing each judge to participate in a wider array of cases with other judges on the court.

Partial assignment of judges to subject matter panels also permits experimentation with the subjects for those panels. Initially the cases assigned to these panels should be among the least controversial within a circuit. Criminal cases and civil rights cases should remain on the general docket. Admiralty, public lands, copyright and trademark cases, depending on the circuit, should be considered for subject-matter panels. Different circuits have different concentrations and priorities of different cases. Thus, securities cases are a major subject of litigation in the Second Circuit, but a relatively minor subject in the Fourth and the Eighth Circuits.[34]

The distinctive advantage of internal subject-matter organization is its flexibility. It can be adjusted to the distinctive caseload and operation of each circuit and to the changing caseload of the federal courts as a whole. It also can be implemented with little more than a change in circuit rules, since it appears to fall within the existing statutory authority for assignment of judges. Section 46(a) of the Judicial Code simply provides that "[c]ircuit judges shall sit on the court and its panels in such order and at such times as the court directs." Unlike courts whose jurisdiction is defined by subject matter, internal divisions among panels defined by subject matter can remain a matter of internal administration of the circuit. They need not be made grounds for rehearing, reversal, or even motions for transfer between panels. Close questions of classification, or even mistakes in allocating cases among panels, could be simply ignored if they created no significant problem of judicial administration. It is essential only that most cases, not all, be correctly assigned and that the assignment in no way constitute prejudgment of the merits.

The flexibility of internal organization by subject matter leaves much to be worked out by each circuit. A mix of subjects for these panels must be defined that is narrow enough to create more stability in the law, yet broad enough to retain the interest of judges. The expansion of federal jurisdiction, which has contributed greatly to the problems facing the courts of appeals, can contribute to the solution by facilitating the assignment of a variety of cases to a single subject-matter panel. Assignment by subject matter must also be meshed with the existing mechanisms for assigning judges and cases to randomly selected panels. Indeed, some circuits have already adopted a limited form of assignment by subject matter by clustering cases that raise similar issues and assigning them to the same panel at a single sitting.[35] The appropriate mechanism for assigning cases need not be devised and administered in detail by Article III judges themselves. An increase in the complexity of the work done by the clerk's office would be more than justified if it allowed judges to perform better the task for which they were appointed--deciding cases and controversies. Limited experiments with internal subject matter organization, perhaps growing out of the present practice of clustered assignment of similar cases to a single panel, would reveal both the strengths and the weaknesses of this means of preserving the coherence of federal law in a large circuit.

III. Screening Devices

Various screening devices are now used by the courts of appeals to determine which cases should receive oral argument and disposition by a signed, published opinion. These range from recommendations and proposed memorandum opinions prepared by central staff attorneys, to preliminary decisions of the judges whether to grant oral argument, to granting oral argument subject to the judges' decision to cut argument short. Screening devices should be conceived more broadly, however, to include any device for separating appeals likely to be meritorious or difficult from those that are more easily resolved. Equal justice does not require equal time for all appeals, but it does entitle the parties to the attention of a panel of judges, at least in proportion to the merit of their arguments. Effective appellate justice for the parties, not just the number and complexity of cases before the courts of appeals, requires judges to distinguish between cases that should receive more attention and those that should receive less.

The need to draw this distinction, even if it is only one of degree, has increased in recent years as the result of two seemingly contradictory trends. On the one hand, the rate of reversal of district court judgments has gone down, from about 25% in 1960 to less than 14% in 1987,[36] but the rate of appeal has gone up during the same period from 10% to 21%.[37] Although both of these trends are attributable in part to reforms providing convicted defendants with counsel on appeal and a free transcript, they are broadly based in general civil litigation in the federal courts. The magnitude and causes of these trends deserve further investigation, but the trends themselves, coupled with the increase in the caseload of the district courts, make clear that it is impossible to return to the practices that prevailed in the courts of appeals even as recently as 1960.

The distinction between harder and easier cases can be drawn in several different ways, not just by administrative mechanisms like screening by central staff attorneys. Restrictions on the timing of appeals, such as the final judgment rule, also perform the same function, as do deferential standards for review on appeal, such as the standard for review of findings of fact under Federal Rule of Civil Procedure 52(a). Other such devices include requiring leave to appeal, shifting attorney's fees onto the losing party or the losing attorney on appeal, or simply increasing the filing fees for an appeal. Although some of these mechanisms may have other advantages, they are not likely to reduce significantly the size or difficulty of the current appellate caseload.

Further restrictions on the right to appeal would leave some final judgments unappealable and, to that extent, compromise one of the principal functions of appellate review: supervising the decisions of individual district judges. Requiring leave to appeal would have the same defect if leave had to be granted by the district judge whose decision was to be reviewed. If leave had to be granted by the court of appeals, it would simply shift the screening function now performed by most circuits to a nominally earlier stage in the appeal, without any improvement. Discretionary appellate jurisdiction, by a procedure like certiorari in the Supreme Court, would greatly compromise the right to appellate review traditionally recognized in our system of justice.

Increasing the fees for an appeal has some plausibility purely as a matter of economics: one obvious way to reduce consumption of valuable resources, like decisions of the courts of appeals, is to raise their price. The present filing fee for an appeal is between $100 and $150, but it is only a small fraction of the total cost of an appeal, which includes the cost of obtaining a transcript and the attorney's fee for preparing a brief and for oral argument. At conservative estimates of $2 per page for 500 pages of transcript and $100 an hour for 40 hours of lawyer's time, these costs typically exceed $5,000. The present filing fees thus amount to 2% to 3% of the cost of even a relatively inexpensive appeal and an even tinier fraction of the cost of trial. To have a significant effect on the rate of appeal, filing fees would have to be increased many times over. Such a step would have the appearance of reserving appellate justice primarily for those with the ability to pay for it, even if filing fees were eventually shifted onto the losing party as costs.[38] Even so, it would not affect criminal appeals or those in which the appellant proceeded in forma pauperis, and indeed, it would increase the cases in which appellants sought a waiver of fees.

Shifting attorney's fees on appeal would be a more effective deterrent to unnecessary appeals and one more consistent with current trends in the law. Section 1927 of the Judicial Code now authorizes sanctions for frivolous appeals, and increasingly it has been interpreted like Federal Rule of Civil Procedure 11, which authorizes the district courts to impose sanctions for groundless pleadings and motions. Other statutes authorize the award of attorney's fees to the prevailing party. An increase in the magnitude and frequency of sanctions for frivolous appeals would be consistent with these statutes, although it would have to be accommodated to decisions interpreting these statutes more favorably to prevailing plaintiffs than to prevailing defendants, especially in civil rights cases.

Sanctions for frivolous appeals, of course, would also exclude criminal cases, in which the constitutional right to counsel, as implemented by the Criminal Justice Act of 1964, encourages appeals even in frivolous cases.

Even in the cases in which they applied, sanctions would not be likely to reduce the workload of the courts of appeals significantly. Sanctions would only deter parties from filing appeals in the weakest cases, which usually can be quickly decided on the merits. As the extensive litigation over Federal Rule of Civil Procedure 11 has made plain, the sanctioning process itself consumes the time and effort of judges. If the sanctions are not effective in deterring weak appeals, the process of administering the sanctions is likely to consume more judicial resources than the sanctions themselves save. General shifting of attorney's fees onto the losing party would avoid the expense of determining whether an appeal was frivolous. The existing fee-shifting statutes, however, only constitute exceptions to the American Rule which still generally requires the prevailing party to bear his own attorney's fees, and even these statutes favor prevailing plaintiffs over prevailing defendants. Consequently, reform of appellate practice by this route must await far more general changes in the American Rule than have yet been accepted. Like other screening devices that discourage the losing parties from taking an appeal, shifting attorney's fees must be drastic in order to be effective.

More familiar screening devices, which classify appeals after they have been filed, into harder and easier cases, raise a different problem: they threaten to replace the decisions of Article III judges with the decisions of staff assistants. This risk can be minimized by various means, but none of these allow the existing screening devices to expand indefinitely with the rising caseload of the courts of appeals. The clerk's office or central staff attorneys play a role in most of the circuits in preliminarily evaluating cases before they are fully considered by the judges. In several circuits, especially the larger ones, decisions about whether to schedule a case for oral argument or to publish a decision are made by the judges based on memoranda drafted by court personnel. The judges' reliance on court personnel resembles, at least in form, their reliance on law clerks. Although it lacks the personal relationship between judges and law clerks, it preserves the essential decisionmaking power of the individual judge over what advice to seek or how to act on it. Under the pressure of a crowded docket, however, judges may be forced to rely on the advice of court personnel without appreciable review, revision, or modification. This may lead practitioners to believe, sometimes correctly, that cases are decided effectively by someone other than an Article III judge. Some distinction between harder and easier cases must be drawn, not just to allocate the time and effort of appellate judges to the cases that pose the most important issues, but to preserve the attractiveness and prestige of an increasingly demanding job. The difficult and important question is how court personnel can assist judges in drawing this distinction without deciding cases themselves.

One approach to this problem would acknowledge the role of court personnel, particularly central staff attorneys, in the decisionmaking process, but open it up to examination by the parties through the adversary process of objections and argument. By analogy to the role now assigned to magistrates in the district courts, central staff attorneys might function as appellate magistrates whose recommendations and opinions were provided to the parties and were subject to objections. In several circuits, the clerk's office effectively decides nondispositive motions in this manner. Similar procedures could be applied to the memoranda and recommendations of central staff attorneys for disposition of cases without oral argument or by unpublished opinions. Formalizing the role of court personnel in such decisions could do much to reduce the misapprehensions of parties and counsel about the extent of their power. In the Ninth Circuit, for instance, counsel are notified that a case has been screened for decision without oral argument and they can file a short statement objecting to this decision.[39] Desirable though such steps may be, they must remain limited if they are not to undermine the whole point of summary procedures, which is precisely to avoid the costs associated with a full adversary presentation of the issues on appeal. Instead of taking briefs on the issue of whether to hold oral argument, it makes much more sense to allow oral argument in most cases, but cut it short when it no longer proves to be helpful.

A further, more fundamental problem arises from the use of appellate magistrates in decisions going to the merits of an appeal: it compromises the central role of the courts of appeals in granting justice to the parties by correcting the mistakes of the district courts. This function requires three Article III judges in the court of appeals to review the work of one Article III judge in the district court. As federal district judges take on a larger role in our society, the need for informed review of their decisions becomes larger too. Magistrates are not well suited to perform this task. Their decision could not be dispositive, without either subjecting the decisions of federal district judges to reversal by an inferior official or transforming the process of review into one of pro forma affirmance. On the other hand, if magistrates only issued recommendations, their decisions would contribute little more to the process of decision than the present recommendations of central staff attorneys.

A different use of court personnel is illustrated by the Civil Appeals Management Plan initiated by the Second Circuit, or CAMP as it is called. Under this plan, staff attorneys function as mediators in persuading the parties to an appeal to settle their case before oral argument, avoiding the need for an argument, conference, decision, and an opinion or memorandum by the court. Although other studies have reached less favorable conclusions, a recent, controlled study of CAMP reported that it resulted in settlements that would not otherwise have been obtained in one-sixth of the cases within its scope.[40] A minority of lawyers who have participated in the plan have complained of the staff attorney's candid assessment of the merits and of what they characterize as his attempts to coerce a settlement.[41] These complaints represent just another variant of the concern that court personnel, not the judges, are actually deciding the case. The Second Circuit has responded to these complaints by providing counsel with copies of the court's guidelines, which make clear that the staff attorney's views on the merits are his own and that he does not communicate them to the court.

This report does not take a position on the ongoing experience with CAMP, beyond supporting the continued use and study of such devices to encourage settlement. The increase in settlements in the Second Circuit may depend upon special characteristics of that circuit, such as the disproportionate number of cases from the New York area, where the meetings between counsel and staff attorneys are usually held, and the court's practice of granting the parties the right to oral argument in virtually every case. On the other hand, with appropriate modifications, it may prove useful in other circuits. Other circuits have experimented with similar programs, although directed primarily at narrowing the issues and improving the quality of briefs.[42] The usefulness of such devices cannot be answered without further experimentation and investigation. What seems unlikely, however, is that CAMP or similar devices will keep up with the increasing caseload of the courts of appeals in the absence of structural reform.

Other screening devices might also be explored, such as initially assigning cases to two judges and adding a third judge only if the first two disagree on the proper disposition of the appeal, or eliminating conferences among judges in some cases, or reducing the number or length of published opinions. None of these proposals, or others that might be devised, should be rejected out of hand without considering how they might be implemented in practice. This report does not seek prematurely to cut off investigation of such proposals. But it is necessary to exercise caution in adopting screening devices that dilute the attention that appellate judges give to the arguments of the parties in reviewing, and where necessary, correcting, the decisions of individual district judges. Only reforms that preserve the central role of Article III judges in deciding appeals are likely to improve the effectiveness of the courts of appeals in any lasting way.

Conclusion

Growth in the federal courts of appeals has been in only one direction in recent years: toward more cases and more cases of greater complexity. If this trend continues--and there are no signs that it is abating--reform of the courts of appeals will not be a question of whether, but a question of when and how. The course that has been followed almost exclusively for the last several decades--simple expansion of the federal judiciary, in the number of circuits and judges and the size of the staffs that serve them--cannot go on indefinitely within the confines of the current structure of the courts of appeals. A similar crisis a century ago led, after a prolonged legislative stalemate, to the creation of the courts of appeals. Another crisis, followed by another stalemate, should not be necessary to adapt the structure created a century ago to the present demands upon the federal judiciary.

This report proposes changes, most of them moderate and experimental and to be accompanied by further empirical research, in the direction in which the courts of appeals should develop: away from simple increases in size toward reorganization of structure, to allow them to coordinate their decisions more effectively and fairly. The expansion of the federal judiciary, and the underlying expansion of federal law, creates diseconomies of scale when judges become too busy with their own cases to be aware of developments in other circuits or in the decisions of other panels within the same circuit. But it also provides opportunities to exploit economies of scale through allocation of jurisdiction and assignment of cases by subject matter. This report has sought to identify some of these opportunities and to propose limited changes, accompanied by further investigation, to take advantage of them. Accordingly, the committee proposes the following specific steps:

1) to study the extent of disuniformity in the decisions of the courts of appeals and to consider whether certain cases might be allocated by subject matter to non-regional circuits;
2) to consider the adoption of limited en banc proceedings in additional circuits;
3) to devise and study proposals for the assignment of cases to panels by subject matter within each circuit; and
4) to examine the use of screening devices in the depth in order to preserve the role of Article III judges in doing justice on appeal.

Like all reforms, these proposals are likely to have disadvantages as well as advantages. For this reason, continued empirical investigation and experimentation are necessary. But it remains important to judge these reforms realistically. Even as recently as 1960, the structure of the courts of appeals was adequate to the tasks assigned to them. This is no longer true today. To deny that serious problems exist in the federal intermediate appellate courts--and that they are likely to become worse--is to ignore the enormous increase in the number and complexity of cases that these courts must now decide. For Congress, the federal judiciary, and the legal profession to fail to act to meet these problems would be a serious failure of public responsibility.

Dissenting Statement

We totally agree that there should be in-depth examination of how well our federal appellate judicial structure is functioning. Thus, with a few language changes, we could adopt much of what is set forth in the proposals in the Conclusion of the Report. Throughout the Report, however, starting with the Preface, there is an underlying assumption that our federal appellate system is at least partially "broke" and requires extensive "fixing," and that the ends of uniformity, specialization and national centralism are paramount.

Those assumptions may, after full consideration, be judged to be correct. But we who dissent believe that the burden is on the proponents to prove that that is so. Under our present system, federal judges are, for the most part, "generalists" rather than "specialists" and are selected and function in regional settings rather than in a central national context. Additionally, by and large, our present system features the common law benefits of "percolation" and achievement of uniformity and certainty by gradual evolution. If there is a need for change, it should be demonstrated.

Turning specifically to the contents of the Report itself, we endorse the call for more empirical study of the work of the federal courts of appeals. The discussion of limited en bancs is very constructive. Further, we tentatively accept the thrust of the proposals in part III for increasing the use of existing screening devices and the possibility of adopting others. But the principal focus of our concern is upon the portions of the Report directed to "nonregional circuits defined by subject matter" and "cases assigned by subject matter" with which we find ourselves in substantial disagreement with the majority. We deal with each in turn.

Specialized Courts

The underlying premise of the Report is that national courts with subject matter jurisdiction will be more efficient and produce more uniform decisions than generalist, regional courts of appeals. As of this time, we know of no empirical data to support that conclusion. A national tax court has been advocated for a half century by very respected experts. But the need for such a court has been rejected by many other knowledgeable persons. There is little evidence to suggest that, in recent years, the conflicts in tax cases among and within the circuits are so serious as to require basic change.

The creation of the Federal Circuit was, apart from the centralization of patent jurisdiction, a consolidation of other specialized courts. The old Court of Claims was a specialized court which was inefficient, slow and cumbersome. Its decisions were widely perceived to be unpredictable and inconsistent. The Federal Circuit has not long been in existence. A close study of its effectiveness in comparison with other circuits is needed before it can be accepted as a model.

The D.C. Circuit is also held out in the Report as an exemplar. Perhaps its decisions are more efficiently and uniformly rendered than the decisions of other circuits. But that too requires study in depth. We also point out that in recent decades that court has been beset by ideological divisions and shifts, and en banc opinions reflecting basic disagreements which may or may not be more likely to occur in a national, as opposed to a regional, court.

The specialized administrative agencies with national jurisdiction offer little promise of efficiency in specialization. By the 1920's, a decade or so after its birth, the Federal Trade Commission had been taken over by the interests it was supposed to regulate. The record of disposal of cases by the National Labor Relations Board hardly poses a model of consistency.

In our view, also, there are issues more important than efficiency and economy. Is it really wise social policy to concentrate in a handful of judges responsibility for deciding all cases in a given regulatory sphere? The Report itself indicates fear that specialized courts might become instruments of the government. That fear may not be justified by the record of certain courts, but it is a fear that can hardly be dismissed in the light of current charges by some administrative law judges that their independence has been subjected to budgetary and other constraints in the handling of Social Security disability benefit litigation.

The appointment of judges to national courts becomes a matter of overwhelming concern to the special interests affected by such courts. Regional courts are intended to disperse power. That is the principle behind Article III. Specialized national courts concentrate power in the hands of fewer judges. Such courts increase the role of the executive branch, and decrease the role of the legislative branch, in the selection of judges. These are shifts to be gingerly approached in an age when the task of balancing the exercise of power by government, acting on behalf of majorities, against the rights of individuals and minorities has become one of the most important duties of our federal judiciary. *See* Justice Brennan's views in "How I Interpret the Constitution," *Judge's Journal*, vol. 26, No. 4 (Fall 1987 ed.). Judges of national courts are largely chosen by the executive and thus by the party in power. Except for the Federal and the District of Columbia circuits, our federal appellate posts are occupied by persons chosen regionally, with major participation by senators representing different areas of our country and different political parties. We believe this separation of powers is sound.

Perhaps the best historical illustration of the effect of specialized courts is the Commerce Court, created in 1910 to review the Interstate Commerce Commission. That commission was then shiny new, and represented the hope of the American people to control railroad rates. The Commerce Court's decisions were so pro-railroad that in 1913, after only three years, Congress abolished it and sent review of the ICC back to the district courts.

This lesson was noted by Frankfurter and Landis in *The Business of the Supreme Court*, p. 174 (1928). After summarizing the history of the Commerce Court, and reviewing the impact of a specialized court on national policy, they said:

> Less than ever is it likely that Congress will entrust these issues to five men, even though invested with the authority of bench and woolsack and subject to the corrective scrutiny of the Supreme Court. But the adjustment of these conflicts, though social and economic in their essentials, lies largely within the control of the judicial power . . .. The issues reach beyond the specialized grasp of the legal profession, beyond the experience and insight of a single court, no matter how well equipped.

Specialized Panels

The problem addressed here is the problem of intra-circuit conflict as opposed to inter-circuit conflict. We agree this is a problem to be looked at. The Ninth Circuit on which Judge Schroeder sits has studied that issue more than any other court in history. That court has surveyed itself, its lawyers and its district judges. It has commissioned academic scrutiny, and instituted new en banc procedures. Some of this is reflected in the Report itself. Some of this work remains ongoing.

The Report proposes a solution to the problem, the dimensions of which are not yet known. Its proposal is the creation of pools of less than half the judges of a circuit to decide all of the cases in specialized areas over a certain period of time.

The Report acknowledges that questions reaching sensitive policy concerns should not be in the hands of a minority of judges of a circuit. Thus, it suggests that "controversial" cases, including civil rights and criminal cases, remain on the generalist docket. If "controversial" is to be the criteria, we would add to that list immigration cases, antitrust cases, environmental cases and constitutional law cases. That leaves us with a fairly limited number of specialized areas, such as trademark and admiralty, which the Report finds amenable to decision by specialized panels. We doubt that even the Ninth Circuit has enough cases in these limited areas to permit a judge in a few years to develop expertise or to promote uniformity. Rather, it is in the so-called "controversial" areas where inconsistencies are most likely to develop. We strongly question whether our society should entrust the law of any given circuit to a small minority of judges in any of those areas simply for the sake of uniformity and efficiency. More calls for en bancs will be the inevitable result. En banc votes are often not efficient and can be bitter.

We recognize that deep thought and hard work have gone into the preparation of the Report. Many parts of the Report provide a good basis for discussion and exploration, but the Report is so grounded in an as yet unsupported assumption of need for change in basic structure and principle, that we respectfully find ourselves in substantial disagreement with the underlying approach of the Report.

Respectfully submitted,

Frank A. Kaufman
James E. Noland
Mary M. Schroeder

NOTES

[1] For the number of judgeships, see P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, Hart and Wechsler's *The Federal Courts and the Federal System* 38 (3d ed. 1988); 28 U.S.C. 44. For the number of filings, see Annual Report of the Attorney-General 3 (1892); Annual Report of the Director of the Administrative Office of the United States Courts 1987 (A.O. 1987) 2, 51, 137, 358 (1988). Unless otherwise noted, figures for the courts of appeals include the Court of Appeals for the Federal Circuit. Figures for recent years are for statistical years, which run from July 1 of the preceding calendar year to June 30 of the identified year.

There has been a corresponding increase in cases disposed of after submission, from 403 in 1892 to about 17,000 in 1987. Annual Report of the Attorney-General 3 (1892); A.O. 1987, *supra*, at 142, 358.

[2] A.O. 1987, *supra*, at 49; R. Posner, *The Federal Courts: Crisis and Reform* 102-03 (1985).

[3] A.O. 1987, *supra*, at 138; Haworth, Screening and Summary Procedures in the United States Courts of Appeals, 1973 Wash. U.L.Q. 257, 281-83. These figures do not include the Court of Appeals for the Federal Circuit.

[4] A.O. 1987, *supra*, at 135.

[5] Annual Report of the Director of the Administrative Office of the United States Courts 1960 (A.O. 1960) 210, 224; A.O. 1987, *supra*, at 2, 7, 13. These figures do not take account of the Court of Appeals for the Federal Circuit.

[6] R. Posner, *supra*, at 82.

[7] A.O. 1987, *supra*, 2, 7, 13. These figures do not include the Federal Circuit.

[8] A.O. 1987, *supra*, at 3, 358. This figure includes all of the appeals to the Federal Circuit, except those from district courts.

[9] A.O. 1960, *supra*, 68, 210; A.O. 1987 *supra*, at 7, 107. These figures do not include the Federal Circuit.

[10] The percentage of trials over three days doubled, from 13% in 1960 to 26% in 1987. A.O. 1967, *supra*, 280; A.O. 1987, *supra*, at 226. For the figures on signed majority opinions, see A.O. 1987, *supra*, at 7, 107; R. Posner, *supra*, at 69, 72, 112, 357. These figures do not include the Federal Circuit.

[11] J. Cecil & D. Stienstra, Deciding Cases Without Argument: An Examination of Four Courts of Appeals 21 (FJC 1987).

[12] 28 U.S.C. § 1295; PL 100-687 (establishing U.S. Court of Veterans' Appeals).

[13] 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4105 (2d ed. 1988).

[14] A.O. 1987, *supra*, at 138.

[15] A.O. 1987, *supra*, at 105.

[16] 17 C. Wright, A. Miller & E. Cooper, *supra*, at § 4106.

[17] See Friendly, Federalism: A Foreword, 86 Yale L.J. 1019, 1023-29 (1977).

[18] For a discussion of the problem and of consolidating judicial review in a single circuit, see McGarrity, Multi-Party Forum Shopping for Appellate Review of Administrative Action, 129 U. Pa. L. Rev. 302, 307-19, 356-60 (1980). Congress has recently amended 28 U.S.C. § 2112(a) to resolve questions of forum shopping by random selection among the circuits in which the parties have sought review. Although this statute eliminates an unseemly race to the courthouse, it does not affect the underlying causes of the race.

[19] A.O. 1987, *supra*, at 105, 142, 358-59. The figure for appeals from the Claims Court is only an estimate.

[20] G. Bermant, P. Lombard, & C. Seron, The Cases of the United States Court of Appeals for the District of Columbia Circuit 3-4, 43 (FJC 1982).

[21] A.O. 1987, *supra*, at 105.

[22] Deciding Cases Without Argument, *supra*, at 30-31; The Cases of the United States Court of Appeals for the District of Columbia Circuit, *supra*, at 7-9.

[23] F. Frankfurter & J. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 162-74 (1928).

[24] A.O. 1987, *supra*, at 149.

[25] In 1987, the circuits decided 81 cases en banc and the Supreme Court decided 99 cases (with full opinions) from the federal courts. A.O. 1987, *supra*, at 106; 101 Harv. L. Rev. 367, 368 (1987).

[26] A.O. 1987, *supra*, at 107.

㉗ Hellman, Book Review--Courting Disaster, 39, Stan. L. Rev. 297, 306 & n.54 (1986); Gardner, Ninth Circuit's Unpublished Opinions: Denial of Equal Justice, 61 A.B.A.J. 1224 (1975); Wasby, Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution, 32 Vand. L. Rev. 1343 (1979). In addition, Professors Hellman and Rosenberg are currently conducting studies of conflicting decisions within the Ninth Circuit, to be published in a collection of essays on that circuit's internal administration and procedures.

㉘ Ninth Circuit Judicial Council, Survey of District Court Judges and Attorneys Regarding the U.S. Court of Appeals for the Ninth Circuit 19-20 (Office of the Circuit Executive 1987).

[29] P.L. 95-486, § 6, 92 Stat. 1633 (1978).

㉚ J. Cecil, Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project 43 (FJC 1985).

[31] R. Posner, *supra*, at 101-02.

[32] J. Cecil, *supra*, at 44.

[33] Accommodating the Workload of the United States Courts of Appeals: Report of Recommendations 7 (1968); Carrington, Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and National Law, 82 Harv. L. Rev. 542, 587-86 (1969). Professor Hazard had earlier emphasized the risk that multiple appellate courts would speak, not with a single voice, but as a "Tower of Babel." Hazard, After the Trial Court--The Realities of Appellate Review, in *The Courts, the Public and the Law Explosion* 60, 81 (H. Jones ed. 1965).

[34] A.O. 1987, *supra*, at 165-66.

[35] J. Cecil, *supra*, at 30-31.

[36] A.O. 1960, *supra*, at 210; A.O. 1987, *supra*, at 155.

[37] R. Posner 90; A.O. 1987, *supra*, at 165-66, 208-10, 294.

[38] Fed. R. Civ. P. 54(d); 28 U.S.C. § 1920, 1923; 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2666, at 173 (2d ed. 1983).

[39] J. Cecil, *supra*, at 77-78.

[40] A. Partridge & A. Lind, A Reevaluation of the Civil Appeals Management Plan 10-11 (FJC 1983).

[41] *Id.* at 63-69.

[42] J. Cecil, *supra*, at 91, 94.

"The United States Courts of Appeals
Reexamining Structure and Process After A Century of Growth"

This report, issued by the ABA Standing Committee on Federal Judicial Improvements, will be the subject of a special program on Sunday, August 6, 1989, at 2 p.m., in the Hyatt Regency Hotel, Honolulu.

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U.S. Court of Appeals, 5th Circuit
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All persons registered at the ABA Annual Meeting are welcome. Comments and questions from the audience will be invited.

Senator **Heflin**. Senator Hatfield.

STATEMENT OF HON. MARK O. HATFIELD, A U.S. SENATOR FROM THE STATE OF OREGON

Senator **Hatfield**. Mr. Chairman, first, I would like your approval to have included in the record two documents, my formal opening statement, and an article authored by Senator Gorton and myself which appeared in a legal periodical.

Senator **Heflin**. So ordered.

Senator **Hatfield**. Mr. Chairman, I suppose, in part, one might ask why would a layman be involved in the highly professional and technical procedure of asking for a division of the ninth circuit.

I have no credentials from the standpoint of the practice of law, but let me say that both as one who has studied a bit of history and who has taught political science, that I have a perspective that might be helpful.

I remember in a graduate program of constitutional law at Stanford when we had a visiting professor by the name of Alphius Thomas Mason, who is the official biographer of Louis Brandeis—a biography called "A Free Man's Soul," and also of Chief Justice Taft. In his discussions and in the seminars that we had on the Supreme Court we discussed that not only did the Court have a constitutional responsibility to review and to rule on cases, but an equal responsibility to do so quickly. The way the Court conducts its business is equally vital for the kind of justice that we talk about in this country. The axiom "justice delayed, justice denied" emanates from that principle.

I also speak not only from the perspective of a student of history, but also as one who has had the privilege of a long association and a warm, personal friendship with Chief Justice Warren Burger, having known the Chief Justice during the time that he was on the D.C. appellate court before his appointment to the Supreme Court. Chief Justice Burger has long recognized the important role of administrating the court's business, and that the way the courts run their own affairs is vital to the whole concept of justice.

In fact, former Justice Lewis Powell once said to me, in his view, that Warren Burger will be recognized as one of the great Chief Justices of the United States because of his role in administering the Court's affairs and putting the Supreme Court together, in creating a high level of efficiency that has not always been characteristic of the Supreme Court and the judicial system in general in this country.

Now, all of that may seem rather academic, except to say that I think it is an important function of the courts to look not just at the kind and quality of opinions they render but to also look at the organization and the administration of the courts.

Mr. Chairman, when I was Governor of Oregon, in 8 years we had a rather extensive expansion of the courts in our State—district courts and circuit courts in particular. Throughout these 8 years, I appointed nearly 100 judges to the State system. In that process, I came to understand and appreciate that very important function of the administration of the court system.

Again, during my time as Governor I had an opportunity to see and talk with many judges about the importance of how they could function as an administrator as well as a lawyer and a judge. It was my privilege to appoint the presiding judge of the ninth circuit, Judge Ted Goodwin, to the supreme court of the State of Oregon. It was my privilege to advocate and recommend him for the Oregon Federal District Court, for the Federal Circuit Court of Appeals of the Ninth Circuit, and also to have recommended him to the President of the United States for a position on the Supreme Court of the United States.

I have the highest respect for the presiding judge and his associates on the ninth circuit, and in no way should this effort to divide the circuit be looked upon as politically motivated or having any political dimension. There are no such dimensions.

Now, Mr. Chairman, I have one last point to make, and that is I am a member of the Subcommittee on State, Justice, and Commerce of the Appropriations Committee. Having been the chairman of the Appropriations Committee of the Senate, I can speak to the fact that we are constantly having to listen to the pleas from the judicial branch for increased funding in order to carry out the business of the court.

I think the courts have legitimately asked for increases in their appropriations, but what I am suggesting is that there is a fiscal factor to be considered here. Do we increase the infrastructure, constantly having to increase the so-called auxiliary support for the judges in their judicial role, or do we look at the most efficient way of administering those courts, such as the ninth circuit with its 28 members. By dividing that court?

I think in any field of administration, and having been in executive administration for 10 years at the State government level, you reach a certain point in the increase of auxiliary support and infrastructure in which you gain a higher degree of efficiency by dividing the project or the program rather than to merely continue to expand.

So I would like to offer these nonlegal, nonlawyer perspectives from my own background, my own experiences, and say to you that Senator Gorton and my colleagues who have sponsored this bill have done so with certainly far greater, more profound reasons than parochial perspectives.

I might say Oregon has done pretty well on the ninth circuit as far as getting appointments. Nevertheless, I could say that there are other States in our region which have not done so well. But I still feel that there is a time when the circuit must be divided. You will hear today from Chief Justice Burger, who is recognized as probably the highest expert in the field of administering the business of the court. He fully supports this bill.

And so I merely wanted to add those points and thank you for the opportunity to be here and, in effect, to introduce presiding Judge Goodwin at the appropriate time in the schedule as my friend.

[Material submitted by Senator Hatfield follows:]

TESTIMONY OF SENATOR MARK O. HATFIELD

HEARING ON S.948, THE NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT

BEFORE THE SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE
PRACTICE OF THE SENATE JUDICIARY COMMITTEE
THE HONORABLE HOWELL HEFLIN, CHAIRMAN

MARCH 6, 1990

Mr. Chairman, I am grateful for your decision to hold this hearing on S.948 and appreciate the opportunity to testify on its behalf. Considering the quality of witnesses you have assembled today (among them Judge Alfred T. Goodwin, Chief Judge of the Ninth Circuit, Chief Justice Warren E. Burger and Senator Roman L. Hruska), I am far more interested in their comments and so will keep mine brief.

Senator Gorton and I have prepared two documents which set out in sufficient detail our case for adoption of S.948. Both will be submitted into the record. One is an article entitled "TIME FOR A NEW FEDERAL CIRCUIT IN THE WEST: Why the Ninth Circuit Should be Divided," which is attached to this testimony, and the other is a statement by Senator Gorton, Senator Stevens and myself which was submitted to the Federal Courts Study Committee during their hearing in Washington, D.C. in January. Those documents speak for themselves and I need not repeat them here. Let me also state that I wish to associate myself fully with the comments of my distinguished colleague from Washington.

Mr. Chairman, I have long been involved in issues of judicial administration, both at the state and federal levels. As Governor of Oregon, I appointed dozens of trial and appellate court judges and was deeply involved with the related issues of court administration. I have been equally involved at the federal level for 23 years, participating in appointments to the Oregon Federal District Court and the Ninth Circuit Court of

Appeals. During my career in public office, I have been involved in over 100 judicial appointments. In fact, as Governor I appointed Judge Goodwin to the Oregon Supreme Court and as Senator pushed his nomination to the Oregon Federal District Court and now the Ninth Circuit.

It should go without saying that I hold Ted Goodwin and the other members of the Ninth Circuit in the highest regard, as friends and as judges. The Ninth Circuit has certainly benefited from the leadership that Judge Browning and he have exercised for the past 14 years. Needless to say, S. 948 should not be interpreted as criticism about the quality of the Court's management or of the decisions it renders.

To a very large degree, one of the major goals of the sponsors of S.948 has been accomplished by this hearing. For too long, the problems facing the Ninth Circuit, and the entire federal circuit system for that matter, have not received the thoughtful attention of Congress and public discussion they deserve. This hearing will help frame the issues and facilitate discussion.

Mr. Chairman, whether measured by number of judges, caseload, geography or population, the Ninth Circuit Court of Appeals is the nation's largest circuit court. Its size has created serious problems: too many judges spending more time (and money) traveling than hearing cases, a growing backlog of cases which threaten to bury each judge, a dangerous inability to keep up with current caselaw, a breakdown in judicial collegiality and, most importantly, a failure to provide uniformity, stability and predictability in the development of federal law throughout the Western region.

It is increasingly clear that these problems cannot be solved by the reforms already implemented by the Court. Sooner or later, the Ninth Circuit will be divided, either by Act of Congress or on a de facto basis by the creation of regional administrative units within the Circuit. In the interest of more thoughtful decisions and swifter justice for those of us who live in the West, it should occur sooner rather than later.

Mr. Chairman, I am saddened and puzzled that some who will appear today have characterized this effort as "the unwelcome cousin of the political gerrymandering of legislative districts"; or that, somehow, we are trying to "shoot the umpire because we don't like the rules of the game." Others see S.948 in the same light as President Roosevelt's effort to "pack" the Supreme Court in 1937. Indeed, there are those on the Court who view this effort as something akin to Attila the Hun invading the Roman Empire.

As you well know, Congress, and this Committee, have long been concerned about the size of the federal circuits in general and of the Ninth Circuit in particular. The issue of reconfiguring the Ninth Circuit has been raised at least three times in this body: in 1972 with the Hruska Commission, in 1980 (resulting in the division of the Fifth Circuit) and in 1984, when legislation similar to bill before you was considered. To say the least, the problems plaguing the court have grown steadily, as have the arguments for its division.

Though not planning to discuss in detail the arguments for S.948 which will be covered by others or are contained in the supporting material which will be submitted, I did want to briefly comment on three issues.

The first is that the delay and backlog experienced by the Circuit is simply unacceptable. Currently, the Ninth Circuit takes 14.7 months (that's one year and almost 3 months!) to make a final decision from the time of filing the notice of appeal;

and the numbers are getting worse. Any way you look at it, justice delayed is justice denied.

The Circuit's response to this increasing caseload has been to add more judges and support staff, establish summary proceedings and develop computer networks. While these innovations have helped increase productivity, the Court's ability to continue to do so is exhausted. The relief these measures provide is temporary, and they focus on bureaucratic proceedures rather than on the attention of individual judges to individual cases. Simply stated, the size of the Circuit works against the original purpose of its creation, which brings me to my second point.

There is currently a lack of geographical balance on the court. Both the Northwest and the Southwest have different interests, demographics and experiences. One of the original purposes of the federal circuit system was to provide for regional representation. As Portland attorney Mark Rutzick points out in his testimony, the demographic shift to the West in the past 20 years, and the resulting growth in the Court, has eliminated any element of regional representation in the Circuit.

Opponents of the bill respond to such an argument by branding it as an illegitimate attempt to "gerrymander" the make-up of the Court, or impermissibly balkanize federal law. The former is not the motivation, and the latter will not be the result. Circuit court boundaries were originally created to reflect this regional identity. Circuit size was determined, in part, by identification of a small set of contiguous states that shared a common background. The goal is not to avoid differences of opinion on various legal issues, nor to splinter the uniform development of federal caselaw. Rather, it is to foster reasoned decisions (which take into account the social, economic and historical circumstances from which legal issues arise) by judges who share similar backgrounds and experiences.

A division of the Circuit will not result in the so-called balkanization of federal law in the region. Indeed, such a problem is not experienced in the East, which is comprised of five separate federal circuits.

Finally, much can be learned from the experience of the Fifth Circuit, which was divided into the new Fifth and Eleventh Circuits in 1984. As Senator Hruska has commented, the judges of these new circuits are delighted with the resultant benefits to them and to the cause of justice. As Chief Justice Clark of the Fifth Circuit stated in 1984 about the benefits of division: "...the principle benefit gained remains that judges, lawyers, and litigants can better cope with a smaller, more predictable universe of case law. Effective conduct and management of litigation requires mastery of this corpus juris. Circuit judges must know its status on a daily basis to keep the law consistent."

Mr. Chairman, I believe the arguments put forth today adequately state the case for the division of the circuit. We delay at our peril.

TIME FOR A NEW FEDERAL CIRCUIT IN THE WEST:

Why the Ninth Circuit Should be divided

Senator Mark O. Hatfield (R-Oregon)
Senator Slade Gorton (R-Washington)

> "The voice of great events is proclaiming
> to us, Reform, that you may preserve."
>
> Lord Thomas Bibington Macaulay

Whether measured by number of judges, caseload, geography or population, the Ninth Circuit Court of Appeals is the nation's largest circuit. Its size has created serious problems: too many judges spending more time traveling than hearing cases, a growing backlog of cases which threaten to bury each judge, a dangerous inability to keep up with current caselaw, a breakdown in judicial collegiality and, most importantly, a failure to provide uniformity, stability and predictability in the development of federal law throughout the region.

It is increasingly clear that these problems cannot be solved by reforms already implemented by the Court. Instead, in the interest of more thoughtful decisions and swifter justice for all of us who live in the West, the time has come to divide the Ninth Circuit.

Toward that end, I joined seven of my colleagues in introducing S. 948, the "Ninth Circuit Court of Appeals Reorganization Act of 1989," earlier this year.[1] If passed into law, this legislation would create a new Ninth Circuit comprised of Arizona, California, and Nevada and a new Twelfth Circuit comprised of Alaska, Idaho, Montana, Oregon, Washington, Hawaii, Guam, and the Northern Mariana Islands. The following article briefly describes the problems of the Ninth Circuit and explains why its division is the only way to solve them.

Problems of the Ninth Circuit: Size and Caseload

The size of the circuits and their caseload have long been a concern of Congress, the Bar and the Judicial Conference of the United States, which had agreed with its Committee on Court Administration in 1971 that "to increase the number of judges in a circuit beyond 15 would create an unworkable situation."[2] To address the concerns of the Conference, Congress in 1972 established a 16-member Commission on Revision of the Federal Court Appellate System, known as the Hruska Commission (after its Chairman, Nebraska Senator Roman L. Hruska).[3] In its 1973 report, the Commission stated:

> "...[the] size of the Court (13 authorized judgeships since 1968) and the extensive reliance it has been required to place on the assistance of district and

> visiting judges have threatened its institutional unity. Attorneys and judges have been troubled by apparently inconsistent decisions by different panels of the large Court; they are concerned that conflicts within the Circuit may remain unresolved."[4]

Although in 1980 the Congress followed the Commission's recommendation that the Fifth Circuit be divided,[5] it did not follow the Commission's similar recommendation for the Ninth Circuit.[6] Yet in years since, the arguments for a division have grown stronger still.

Testifying before the Senate Judiciary Committee in 1984, Circuit Judge Eugene Wright argued that a federal appeals court cannot be effective with more than nine judges.[7] Throughout his testimony, Judge Wright argued that a circuit should be configured so that judges can be drawn from regions with common legal problems, that there should be close personal relationships and collegiality among the judges, and that there should be consistency in the circuit's decisions. Judge Wright also observed that "some of the judges of the Ninth Circuit are now no longer able to remain current with the law of the Circuit as it develops," and that because of "the volume of this printed material, judges are obliged to rely on law clerks, staff attorneys, librarians, and the eternal hope that their next opinions do not stray too far from the current law of the Circuit."[8] Today, the arguments for dividing the Ninth Circuit grow even stronger.

The statistics relating to the Ninth Circuit are truly staggering: Nine states and two U.S. Territories comprising over 40 million people fall within the Circuit's jurisdiction. To handle this vast area, the Circuit uses 28 appellate judges, 11 senior circuit judges, 87 district judges, 40 senior district judges and 62 active and 8 recalled bankruptcy judges (not to mention the legions of law clerks and support staff). Ten new judges will likely be requested in 1990 and, ultimately, additional circuit judges will be needed.

The caseload of the Circuit is equally immense, with 6,621 cases filed in 1988 alone, an increase of over 20 percent since 1987. If the present rate of growth in federal appeals continues, the caseload of the circuits, particularly the Ninth Circuit, will likely double in the 15 years from 1980 to 1995. Nationally, the Administrative Office of the U.S. Courts estimates that appeals will likely increase 74 percent by the year 2000. Increases in the quantity of appeals will be accompanied by an increase in the complexity of each case, typically requiring longer trials and a longer time to dispose of any appeal.

The most obvious result of this workload is delay and backlog. Currently, the Ninth Circuit takes 14.5 months to make a final decision from the time of filing the notice of appeal.[9] That delay is much longer than the national average of 10.2 months. In fact, the Ninth Circuit has the longest median time interval from filing the notice of appeal to the filing of the last brief, 6.4 months.[10]

Another consequence of this increasing caseload, and the volume of decisions which result, is a shift in the Courts' adjudicative role. As observed by Fourth Circuit Judge J. Harvie Wilkinson III, "Dean Carrington and Dean Griswold both take the court of appeals to task for what they called discretionary justice. Dean Carrington says that we have forsaken the function of error correction for discretionary justice -- that there is so much law and so much doctrine out there that we just pluck from here and there to reach the results we want. If that is the trend, I think it is a very unhealthy one."[11]

The Circuit's response to this increasing caseload has been to add more judges and support staff, establish summary proceedings and develop computer networks. That response may provide temporary relief, but these measures focus on bureacratic procedures rather than on the attention of individual judges to individual cases. The size of the Circuit now works against the original purpose of its creation: the uniform, coherent and efficient development of federal law in the region.

Obviously, merely adding more judges to the Ninth Circuit to handle the increased caseload is not the answer. As stated in a March 1989 report by the American Bar Association's Standing

Committee on Judicial Improvements, "The side effects of the standard cures for increasing caseload may prove to be as serious as the original disease."[12] This lack of coherence and unity in the Ninth Circuit's decisions and the resulting inability of the Court to speak with one voice is perhaps the most dangerous side effect now being experienced by those of us who live within its jurisdiction.

Problems of the Ninth Circuit: Intracircuit Conflicts

That lack of coherence and unity is the result of a growing incidence of inconsistency or conflict among the decisions of the three-judge panels. With 28 circuit judges on the Circuit, the number of possible combinations of panels within the Circuit totals 3,276. That staggering number becomes much higher when one includes the use of senior circuit judges, district judges and judges from other circuits. These additional judges comprised 17 percent of judicial participation in panel decisions in 1987. Naturally, with the increase in the number of possible panels comes the greater probability of conflict between each panel and the greater difficulty of keeping abreast of other panel decisions in order to avoid those conflicts.

A recent Ninth Circuit Judicial Council survey of district court judges and attorneys regarding the Ninth Circuit highlights the problems of inconsistency and lack of uniformity. This survey found that 40 percent of the judges and 31 percent of the lawyers polled disagreed with the statement, "Ninth Circuit opinions generally adhere to law announced in earlier opinions." A clear majority of both groups, 68 percent of the judges and 59 percent of the attorneys, disagreed with the statement, "there is consistency between panels considering the same issue."[13]

As recently pointed out by Stephen L. Wasby, professor of political science at the State University of New York at Albany, this type of intracircuit inconsistency poses a problem "because lawyers advising their clients have difficulty deciding which precedents to follow and district court judges are unsure what rules to apply in the cases they must decide."[14] Intracircuit conflicts are far more problematical than conflict between the circuits because of the manner in which those conflicts are addressed. As stated succinctly by the American Bar Association's Standing Committee on Federal Judicial Improvements:

> "Conflicts among the circuits might be valuable because they reveal the consequences of taking one position rather than another, but the inability of a circuit to adhere to a single position obscures what those consequences are. Intracircuit conflicts are also more likely to escape notice than intercircuit conflicts. A panel opinion can be fairly frank about rejecting or interpreting narrowly and unsympathetically the decisions of another circuit.

> It is likely to be far more circumspect in its treatment of an earlier decision of another panel of the same circuit, which would otherwise consitute binding authority."[15]

This problem of intracircuit conflict is exacerbated by the Ninth Circuit's use of limited en banc review, precisely because less than the full court is involved. The Court's use of the limited en banc procedure, consisting of the Chief Judge and ten other active circuit judges chosen by lot, necessarily weakens the precedential impact of decisions rendered in the name of the full court.

Traditionally, conflict within a circuit is eliminated by decisions en banc. All of the judges are involved in the proceedings, from the review of briefs to oral argument to the formulation of the opinion. With the limited en banc procedure, however, only 11 of the 28 judges are involved. Naturally, the decision of the Court becomes less authoritative. As Heritage Foundation lawyer Aquiles F. Suarez points out, "Judges who have not participated in rendering the decision being reviewed naturally feel less allegiance to upholding that interpretation, while in a traditional en banc setting, the judges who had promulgated a disputed view of the law would be present to defend it. Thus in the case of the Ninth Circuit each decision reached by a limited en banc court has less impact upon subsequent similar cases."[16]

Third Circuit Judge Joseph F. Weis, Jr., Chairman of the 1989 Federal Court Study Committee, agrees with this assessment. Of the Ninth Circuit's use of limited en banc procedures, he notes "[t]here are some cases that have such great public significance, it seems to me, that it's really critical that an entire court sit and decide; that the imprimatur of the entire court be placed upon this decision; that the people in the circuit have the right to know that that (sic) is really the considered view of the whole court. The court also becomes, I think in general, simply less efficient."[17]

Specifically because of these concerns, the Fifth Circuit refused to use this limited en banc procedure to eliminate conflicts in the law, opting instead for a division of the Circuit. During the 1984 Congressional hearings regarding the division of the Fifth Circuit, Chief Judge Charles Clark stated that the Fifth Circuit was of the view that "the law of the circuit would be more consistent if all of the judges charged with making that law participated in the en banc decisions."[18]

Rather than eliminating uncertainty, the Ninth Circuit's use of limited en banc review actually perpetuates it. Because of the possibility that the court's interpretation of the law can vary depending upon the panel, attorneys and litigants are unable to know the Ninth Circuit's final interpretation of any particular legal issue. That uncertainty makes it difficult to establish a trial or appellate strategy and may result in "panel shopping" by filing a questionable appeal in hopes of benefiting by the luck of the draw.

Problems of the Ninth Circuit: Inadequate Regional Representation

A more subtle, but increasingly important, problem with the current size of the Ninth Circuit is the lack of geographical balance on the court. Both the Northwest and the Southwest have different interests, demographics and experiences. Judges who lack a full understanding of the regional melieu out of which legal issues arise are hindered when making decisions which involve those issues. As stated by Stan Pitkin, former United States Attorney for the Western District of Washington, before the Hruska Commission, "...Judges whose background and experience lie in places a thousand miles from a given court are unlikely to have a full appreciation of regional aspects of an issue, even if they are aware of them."[19]

Because of the dominance of California, which generates over 60 percent of the Ninth Circuit's annual caseload, a majority of the Court is from California. Presently, there are no judges from Alaska, Idaho or Montana. This lack of geographical balance is particularly troubling when, as now, the Northwest is developing its own unique legal issues in such areas as energy, commercial and environmental law. This need for greater regional representation is demonstrated by the fact that the East Coast is comprised of five federal circuits.

Conclusion

When is a circuit court too large? Admittedly, it is a difficult line to draw, but at some point this question must be answered. There is a growing awareness in Congress that the problems which plague the Ninth Circuit cannot be addressed by simply adding more judges.

If the experience of the Fifth Circuit, which was divided into the new Fifth and Eleventh circuits in 1984, is any guide, there are a great many benefits to be derived from such a division. As Chief Judge Clark of the Fifth Circuit stated in 1984 about the benefits from that Circuit's division:

> "...the principal benefit gained remains that judges, lawyers, and litigants can better cope with a smaller, more predictable universe of case law. Effective conduct and management of litigation requires mastery of this corpus juris. Circuit judges must know its status on a daily basis to keep the law consistent."[20]

Whether the decision to divide the Ninth Circuit is made now or in the future, the problems associated with its current operation are serious and will require additional Congressional inquiry. The legislation currently proposed to divide the Ninth

Circuit is designed to promote greater uniformity and consistency in the development of federal caselaw, improve the administration and efficiency of the court and ultimately strengthen the constitutional guarantee of justice to which we are all entitled.

FOOTNOTES

1. S. 948, 101st Congress, First Session. Cosponsors include Senators Gorton (R-Washington), McClure (R-Idaho), Murkowski (R-Alaska), Burns (R-Montana), Stevens (R-Alaska), Packwood (R-Oregon) and Bacus (D-Montana).

2. *Reports of the Judicial Conference--Report of the Administrative Office, U.S. Courts, 1971* at 81.

3. Established by Act of October 13, 1972, 86 Stat. 807, the Commission, chaired by Senator Roman L. Hruska, was composed of four members appointed by the President, four by the Senate, four by the House, and four by the Chief Justice. *Id*., Section 2. An American Bar Association study had earlier recognized that both the Fifth and Ninth Circuits may have to be divided due to the large number of judges needed to hear the cases before the circuits. American Bar Association, *Accommodating the Workload of the United States Courts of Appeals: Report of Recommendations* (1968) reprinted in *Commission on Revision of Judicial Circuits: Hearings on H.R. 7378 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 92nd Cong., 1st Sess., Ser. No. 17, 32-44 (1972).

4. Commission of Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change* (December 18, 1973), reprinted at 63 F.R.D. 223 (1974), at 12.

5. Act of October 14, 1980, 94 Stat. 1994, authorized the division of the old Fifth Circuit into a new Fifth Circuit, composed of Louisiana, Mississippi, Texas and the Canal Zone, and a new Eleventh Circuit, composed of Alabama, Florida, and Georgia. This circuit composition is codified at 28 U.S.C. Section 41. For additional background, see: *Circuit Realignment: Hearings on S. 2988, S. 2989, and S. 2990 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93rd Cong., 2d Sess. (1974); *Circuit Realignment: Hearings on S. 729 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975); *A Proposal to Divide the Fifth Circuit: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess., Ser. No. 25 (1978); *Federal Court Organization and Fifth Circuit Division: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess., Ser. No. 64 (1980).

6. In the 94th Congress, proposals to divide the Fifth Circuit and the Ninth Circuit were separated into two bills by the Senate Judiciary Committee and reported individually; Fifth Circuit: S. 2752 [an original bill], S. Rep. 513, 94th Cong., 1st Sess. (1975); Ninth Circuit: S. 729, S. Rep. 1227, 94th Cong., 2d Sess. (1976). By the time of passage of the "Fifth Circuit Court of Appeals Reorganization Act of 1980," Act of October 14, 1980, 94 Stat. 1994, there appeared to be no

organized opposition to the bill which was unanimously endorsed by all Fifth Circuit judges in regular active service. H.R. Rep. No. 1390, 96th Cong., 2d Sess. 2-5 (1980). Another attempt was made in the 98th Congress in the form of S. 1156. That legislation proposed a new Ninth Circuit composed of Arizona, California, Nevada, Guam and Hawaii and a new Twelfth Circuit composed of Alaska, Idaho, Montana, Oregon and Washington. S. 1156, 98th COng., 1st Sess. reprinted at 7 in Oversight on the Federal Court of Appeals and U.S. Claims Court Workload and a Hearing on S. 386, S. 677, and S. 1156 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess., Ser. No. J-98-97 (1984).

7. Oversight on the Federal Court of Appeals and U.S. Claims Court Workload and a Hearing on S. 386, S. 677, and S. 1156 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess., Ser. No. J-98-97 (1984), p. 20-21.

8. Id., at 17.

9. Annual Report of the Director of the Administrative Office of the United States Courts, 1988, at 155.

10. Id.

11. Remarks of the Honorable J. Harvie Wilkinson III, Symposium: Federal Courts: The Next 100 Years, Commentaries I, 38 S. Carolina L. Rev. 439 (1987).

12. The United States Court of Appeals: Reexamining Structure and Process After a Century of Growth, Report of the American Bar Association Standing Committee on Federal Judicial Improvements, March 1989, at 6.

13. Ninth Circuit Judicial Council, Survey of District Court Judges and Attorneys Regarding the U.S. Court of Appeals for the Ninth Circuit 19-20 (Office of the Circuit Executive 1987).

14. Wasby, Stephen L., Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution, 32 Vand. L. Rev. 1343 (1979).

15. See Note 12, Supra. at 26.

16. Suarez, Aquiles F., No More Justice Delayed: Time to Divide the Ninth Circuit Court of Appeals, The Heritage Foundation (Backgrounder No. 711, 1989).

17. Transcript of Procedings of the Federal Court Study Committee, March 1989, at 28.

18. See Note 6, Supra. at 90.

19. See Note 6, Supra. at 18

20. See Note 6, Supra at 96.

Senator HEFLIN. Senator McClure.

STATEMENT OF HON. JAMES A. McCLURE, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator McCLURE. Thank you very much, Mr. Chairman. It is a pleasure for me to be here today to express my support for S. 648. I appreciate your willingness to schedule this hearing. As a former member of the bench, I am sure your experience will be most helpful to us as we try to improve the efficiency of the judiciary and provide a less expensive form of justice.

S. 948 represents the third time the ninth circuit has faced division. Since the late 1960's, the judges of the ninth circuit have resisted attempts to reduce the size of the circuit. I am sure we will hear testimony today that the judges on the bench will oppose this legislation.

However, the circuit's former Chief Judge Browning was correct when he testified in 1984 that, and I quote, "Our court fully understands and willingly accepts the fact that it is a function of this Congress and not the court to determine what is in the public interest in this connection," end of quote.

Mr. Chairman, I certainly share Judge Browning's view. It is a congressional responsibility to create such inferior courts as the Congress may from time to time ordain and establish.

I believe it is in the best interest of the public to divide the ninth circuit. The ninth circuit is the largest of the 11 judicial circuits in the country in the number of judges, in its size, its caseload, and the number of people it serves.

The ninth circuit is the Federal appeals court for 49 million people. This is one-fifth of the entire population of the country. Mr. Chairman, the ninth circuit has 28 appellate judges. As the caseload increases, there will be additional need for more judges. There was a 15-percent increase in the number of appeals filed last year alone.

In my view, the strongest argument for division of the circuit is because the larger the circuit, the less clear the law, resulting in even more litigation. In 1989, in Federal Courts Study Committee hearings, Judge Joseph Weiss, Jr., explained that as the number of judges increases, so does the divergence in views, which results in more litigation for the American public. As the law becomes less clear, it is more difficult to conform to the law, and good-faith disputes arise which parties seek to resolve by litigation.

Furthermore, because of the size of the circuit, both judges and lawyers have a difficult time keeping abreast of the law. A survey of lawyers in the ninth circuit concluded that the most pressing problem of the circuit is the incredible caseload. The American Bar Association found that conflicts regarding opinions within circuits pose the greatest problem in the largest circuits.

It has been said that the ninth circuit follows a rule that a decision of a panel establishes the law of the circuit and is binding on all subsequent panels of the circuit. However, Erwin Griswold stated it is sometimes said that this is the current practice, but any observer quickly sees that this generally is not the case.

In the middle of the last decade, two different panels of the ninth circuit reached directly conflicting results on the same issue. A petition en banc was denied. The issue remained unsettled until the Supreme Court ruled on the issue a few years later. In short, the right hand may not know what the left hand is doing.

Mr. Chairman, the ninth circuit takes about 14.5 months to dispose of a case, from filing a notice of appeal to a final decision on its merits. The national average is just over 10 months. It takes the ninth circuit almost half again as long to process an appeal. In addition, the ninth circuit has the longest time from filing a notice of appeal to the filing of the last brief in a case—6½ months.

Another area of concern is the vast geographic area which is covered by the ninth circuit. This greatly increases the travel necessary to hear and try cases, reducing time for research and consideration and increasing costs to clients.

In 1988, over $865,000 was spent for judges to travel throughout the circuit. This is more than $250,000 higher than it is in any other circuit. The total expenses for the ninth circuit totaled over $25 million in 1988. This is about one-fifth of the entire budget for all circuit courts, and it is rising.

The report of the American Bar Association's Standing Committee on Federal Judicial Improvements stated that division of the ninth circuit may be justified on grounds of administration and reducing the travel of judges and attorneys.

Mr. Chairman, there are a number of other persuasive reasons why the ninth circuit should be divided. I am sure others will mention these in their testimony today.

I would like to include a copy of a letter I received from the Idaho attorney general, Jim Jones, which includes a resolution adopted by the Western attorneys general in support of dividing the ninth circuit. I would like to point out that this resolution expresses the view of each attorney general within the ninth circuit. California, Arizona, and Nevada agree that the creation of a twelfth circuit is needed.

[The letter and resolution referred to above follow:]

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
BOISE 83720

JIM JONES
ATTORNEY GENERAL

TELEPHONE
(208) 334-2400

March 2, 1990

The Honorable James McClure
United States Senator
Senate Office Building
Washington, D.C. 20515

Dear Senator McClure:

S.948, the Ninth Circuit Reorganization Act of 1989, proposes to divide the Ninth Circuit Court of Appeals into two federal court circuits. Arizona, California and Nevada would be in one circuit and Alaska, Idaho, Montana, Oregon, Washington, Hawaii, Guam and the Northern Mariana Islands in the other. I would urge your support of this legislation.

Senator Gorton, who introduced S.948, correctly states that the Ninth Circuit is too large. It is the largest federal circuit in the country in number of judges, caseload, geographical size and population. In part because of its size and caseload, the Ninth Circuit requires the longest time of any of the federal circuits to dispose of cases. The national average is 10.2 months, while the Ninth Circuit's average is 14.5 months.

The costs of administration and travel for the Ninth Circuit are the highest in the country. I am told that about 20 percent of the total funding for all of the federal circuits goes to the Ninth Circuit and that the figure continues to climb. Costs for litigants are also increased by virtue of travel requirements.

The large number of judges on the Ninth Circuit makes it difficult to predict or achieve reasonable consistency in decision making. Conflicting decisions are not uncommon. The Ninth Circuit is the only federal circuit that does not convene en banc panels of all judges to resolve such disputes. Instead, it utilizes a limited en banc procedure, utilizing fewer than one-half the circuit judges by lot to sit en banc.

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In addition, there has been a tendency by some judges on the Ninth Circuit to permit ideological views to intervene in their decision making. For example, the Ninth Circuit has yet to finally resolve a contested state death penalty judgment. The death penalty decisions of the Ninth Circuit, illustrated by *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), *Coleman v. McCormick*, 575 F.2d 1280 (9th Cir. 1989), and *Ushaffer v. Whitley*, 860 F.2d 1470 (9th Cir. 1988) are all too often nothing more than displays of legal inventiveness by judges who would rather avoid the law of capital punishment than follow it.

While splitting the Ninth Circuit will not solve all of the problems we have encountered with it during my tenure in this office, it will certainly be a step in the right direction. The Commission on Revision of the Federal Court Appellate System recommended the division of the Ninth Circuit years ago and that recommendation is valid and even more appropriate today. In addition, the Conference of Western Attorneys General adopted a resolution in support of that course of action at its annual summer meeting in Jackson Hole last August. A copy of the resolution is enclosed. I hope you will be able to support this legislation.

Sincerely,

JIM JONES
ATTORNEY GENERAL

JTJ/tg

Enclosure

CONFERENCE OF WESTERN ATTORNEYS GENERAL THE COUNCIL OF STATE GOVERNMENTS
121 SECOND STREET 4TH FLOOR SAN FRANCISCO, CALIFORNIA 94105 TELEPHONE (415) 974-8422

WESTERN STATES
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COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
GUAM

RESOLUTION NO. 89-07

PROPOSED BY ATTORNEY GENERAL KENNETH O. EIKENBERRY (WA)

SUPPORTING DIVISION OF THE NINTH CIRCUIT COURT OF APPEALS

WHEREAS, the Ninth Circuit is the largest federal circuit in the country in number of judges, case load, geographical size and population; and

WHEREAS, the Commission on Revision of the Federal Court Appellate System recommended the division of both the then-Fifth Circuit and the Ninth Circuit each into two smaller circuits, however, Congress only acted to divide the Fifth Circuit; and

WHEREAS, the Ninth Circuit, in part because of its size and load, requires the longest time to dispose of cases (14.5 months versus 10.2 months national average); and

WHEREAS, the Ninth Circuit costs of administration and travel are the highest in the country; costing about twenty percent of total funding for all thirteen federal circuits which costs continue to rise. Costs for litigants also are increased by travel requirements; and

WHEREAS, many commentators have observed the large number of judges, cases and opinions within the circuit make it difficult for the Ninth Circuit to maintain consistency of law and conflicting opinions have become more common. The Ninth Circuit is the only circuit that does not convene en banc panels of all judges to resolve such disputes rather than utilizing a 'Limited En Banc' procedure choosing fewer than one-half the circuit judges by lot to sit en banc; and

WHEREAS, federal circuits should be constituted so as to assure that judges hearing cases will have familiarity with regional issues and state laws which are implicated by their decisions. This can be accomplished better by dividing the Ninth Circuit.

WHEREAS, such reorganization which reconstitutes the existing Ninth Circuit into two circuits should be accomplished without splitting any one state between two circuits.

NOW, THEREFORE, BE IT RESOLVED that the Conference of Western Attorneys General supports legislation dividing the Ninth Circuit into two separate circuits; a reconstituted Ninth and a new Twelfth Circuit.

(RESOLUTION ADOPTED ON AUGUST 4 AT THE 1989 CONFERENCE OF WESTERN ATTORNEYS GENERAL ANNUAL MEETING IN JACKSON, WYOMING.)

Senator McClure. Mr. Chairman, in closing, I want to mention that the Commission on Revision of the Federal Court Appellate System recommended the division of both the then fifth circuit and the ninth circuit each into two smaller circuits. You were successful in dividing the fifth. I hope we will be successful in dividing the ninth to improve the efficiency of the Federal appellate system which serves our constituents.

Thank you, Mr. Chairman.

Senator Heflin. Senator Burns.

STATEMENT OF HON. CONRAD BURNS, A U.S. SENATOR FROM THE STATE OF MONTANA

Senator Burns. Thank you, Mr. Chairman, and I will keep my remarks brief. I do want to associate myself with the remarks of the honorable Senator from Oregon, Senator Hatfield.

I am not trained in the legal profession either, but all during the campaign in 1988 we kept hearing from a fraternity of attorneys in Montana and judges saying something should be done with the ninth circuit court of appeals.

I cannot raise any point that hasn't already been brought up. However, the most compelling reason that I can see for doing something to split this court is due to its size alone. It represents one-fifth of the Nation's population. It has the largest caseload; 6,933 cases now pending, and the nearest to that is 3,366 cases in the next biggest circuit. In fact, we are told that some of those cases take as long as 24 to 27 months.

The ninth circuit court has jurisdiction over a land mass equal in geographical size to Western Europe. Another perspective on this is that it covers an equivalent land mass to that of six circuits on the east coast.

It just doesn't make sense that judges spend more time traveling than hearing cases in the ninth circuit. We need a circuit court arrangement in the West that will hear cases more quickly, with less intracircuit conflict, and which will result in the administration of a more consistent and predictable body of Federal law.

The split will bring much-needed relief to the ninth circuit while providing overall judicial relief to States in the West and the Northwest, including my home State of Montana.

I have had letters from many folks in the State of Montana advocating this split, and I would at a later date like to have a letter from Montana's attorney general, Marc Racicot, be made part of the record.

I will submit the rest of my comments for the record, and I thank you very much for this opportunity.

[The prepared statement of Senator Burns and the letter referred to above follow:]

S. 948, The Ninth Circuit Court of Appeals
Reorganization Act of 1989
Testimony before the Judiciary Subcommittee
on Courts and Administrative Practice
Senator Conrad Burns
March 6, 1990

Mr. Chairman,

I want to first express my appreciation of your willingness to hold a hearing on this bill which has historically been a contentious proposal. I know, however, that as a former judge you have the utmost respect for the judicial process and want to ensure that its integrity is maintained. Your willingness to explore this option reflects that attitude and I appreciate that.

This legislation would split the current Ninth Circuit Court of Appeals and create a new circuit. The new Ninth Circuit would consist of Arizona, California and Nevada, and a new Twelfth Circuit would consist of Alaska, Idaho, Montana, Oregon, Washington, Hawaii, Guam and the Northern Mariana Islands. This split is long overdue in my opinion.

The most compelling reason for the split is the mere size of the Ninth Circuit. It is by far the largest circuit court. It currently has 28 judges, nearly twice the number deemed as "workable" by the Judicial Conference of the United States. It had the largest caseload of any circuit pending at the end of 1989 with a total of 6,933 cases according to statistics published by the Administrative Office of the United States Courts for 1989. The Ninth Circuit has jurisdiction over nearly 1/5 of the people in this country. Its geographical size is equal to all of Western Europe as a land mass!

In contrast, the next largest circuit in terms of judgeships is the Fifth Circuit with 16. The circuit with the second most cases pending in 1989 is the Eleventh Circuit with 3,366 cases, which is less than half the number pending in the Ninth. The size of the Ninth Circuit Court's jurisdiction in terms of total population of our country is twice the average number of people under the jurisdictions of the other ten circuits. And finally, the Ninth Circuit covers a land mass in the West roughly equivalent to the land mass covered by six circuits on the East Coast. I recognize, of course, that the population dynamics of the two coasts are somewhat different.

These figures illustrating the size of the Ninth Circuit Court are impressive in and of themselves. However, the impacts of a circuit court this large on the judicial process are just as impressive and far more grave.

Using the 1989 Federal Court Management Statistics, I have learned that each case in the Ninth Circuit takes an average of 15.3 months for decision. That means some cases may be there 30 months--that's two and a half years to you and me--while others whiz through in 8 or 9 months! It is also important to note that this situation is getting worse, not better. The 1988 Federal Court Management Statistics shows that in 1988 each case was pending for an average of 14.5 months. The costs to those in Montana or Washington who are victims of this backlog continues to accrue. Not only are they continuing to pay their legal counsel during that time, but in the case of suits against industrial activities such as timbering, mining and water development, employment is jeopardized, seriously threatening local economic stability. This is of serious concern to states like mine which can not suffer any more economic blows.

The criticism is also leveled that the judges on the Ninth Circuit spend more time traveling than hearing cases. That doesn't make sense to me. If our goal is to maintain the efficiency and integrity of the judicial process, we should take steps to see that cases are heard and decided expediently and at the least cost to the taxpayer.

Following passage of legislation in 1978, the Ninth Circuit reorganized to create three administrative units based in San Diego, San Francisco, and Seattle; and developed limited en banc procedures. The Ninth Circuit's Chief Judge cites these changes to illustrate the Circuit's ability to maintain efficiency while issuing a consistent and predictable body of federal law. He also cites the court's use of a computerized system to inform panels about similar issues heard by earlier panels (cases brought before the Ninth Circuit, or any of the other circuits, are generally heard by a three-judge panel) as proof that the Ninth Circuit is operating efficiently and effectively. However, practical evidence to the contrary illustrates that despite these good intentions, the Ninth Circuit is giving rise to a body of law which is not uniform and on which western states can not rely.

In the Ninth Circuit we have too many cases where the right hand does not know what the left is doing. For example, a United States Bankruptcy Judge in Montana recently sent me copies of two opinions -- by two separate three-judge panels within the Ninth Circuit -- decided within one week of each other and holding an opposite result. Both cases involved Montana farmers suing the Farmers Home Administration (FHA). The Love case held that farmers could sue FHA under the Federal Tort Claims Act and reversed the lower court's decision holding that the claim had to be pursued under the Tucker Act in the Court of Claims. One week later, to the day, on April 13, 1989, a different panel held that the farmers LaPlant could not sue FHA under the Federal Tort Claims Act, but had to resort to the Court of Claims under the Tucker Act. Now, I know that these are the types of decision which will be resolved by en banc review, but the message sent to this bankruptcy judge was one of confusion.

Also, according to a report issued by the Heritage Foundation and authored by Aquiles Suarez, the Ninth Circuit's limited en banc procedure "undermines the principle of precedent." Based on the fact that a court sitting en banc is meant to reflect the final decision of the full court, Suarez maintains that this principle is undermined because:

> In the Ninth, however, only a minority of the judges of the circuit (11 out of 28 active judges) hear a case involving conflicting judicial interpretations of the law. Moreover, ten of the eleven judges on the limited en banc court are chosen by lot. Thus, if two three-judge panels in the circuit reach conflicting decision regarding the same question of law, the ensuing limited en banc court convened to resolve the conflict may contain the three judges from one panel, or the three judges from the conflicting panel, all of these judges or none of these judges. (The Heritage Foundation Backgrounder, June 14, 1989, "No More Justice Delayed: Time to Divide the Ninth Circuit Court of Appeals, p. 7.)

Naturally any judge may call for a convening of the full court at any time, however, it has become impractical to do so for all intents and purposes. In fact, the Heritage Foundation report cited above found that following the 1978-79 reorganization of the Ninth Circuit and prior to 1984 Congressional hearings, the full Court had not been convened even once to rehear a case.

There are a couple of arguments to be made which do not relate directly to the size of the Ninth Circuit. In fact, one of the most compelling arguments for splitting the Ninth Circuit is the fact that the precedent has already been set by the Fifth Circuit split. In fact, a commission which studied the revision of the Federal Appellate Court System recommended in 1973 that both the Fifth and Ninth Circuit Courts be split. Those involved with the Fifth Circuit had the sense to make the division. Unfortunately, the division of the Ninth Circuit was held up because it proposed dividing the state of California between two circuits. Our bill does not propose dividing California. However, the division is still more complicated due to the fact that California generates 60 percent of the Ninth Circuit's caseload and contains roughly two-thirds of the population served by the court. No matter how you slice it, with California intact, the Ninth Circuit will still be the largest Circuit. The important fact is that the split will bring much needed relief to the Ninth Circuit while providing overall judicial relief to states in the rest of the West and Northwest, including my home state of Montana.

Finally, the last argument I would like to make, and the closest to home, is that the Northwest and Southwest are different regions with different histories, climates and economics. As I pointed out earlier, the East Coast has six circuits to handle a land mass equal to that handled in the West by one circuit--the Ninth. This also results in a situation where a case heard in the Northeast, say in the Second Circuit, will be heard by a judge from either Connecticut, New York, or Vermont. These are all Northeastern states with similar demographics. Likewise, a case heard in the Southeast, say in the Eleventh Circuit, will be heard by a judge from Alabama, Georgia, or Florida. These again are all Southeastern states with similar demographics, yet they are distinctly different from those in the Northeast. I think that the West deserves the same judicial fairness. I feel that judges from Montana, Idaho, Oregon and Washington should rule on cases from those states, not because home state judges will rule more favorably, but because they understand the region and are more familiar with the bodies of law that pertain to those states.

I know that many of these arguments have been made before, but I hope my testimony will help put them in perspective. I feel very strongly about this issue--it is in many ways an issue of fairness--that the Ninth Circuit should be split into two circuits. I look forward to hearing the testimony of the experts on both sides today, and look forward to working with the Committee to see this issue resolved.

ATTORNEY GENERAL
STATE OF MONTANA

Marc Racicot
Attorney General

Justice Building
Helena, Montana 59620

SENATOR CONRAD BURNS
RECEIVED
90 FEB 26 AM 11:08
WASHINGTON, D.C.

February 21, 1990

The Honorable Conrad Burns
U.S. Senate
825A Hart Senate Office Bldg.
Washington DC 20510

Dear Senator Burns:

I would like to encourage your continued support for S.948, the Ninth Circuit Court of Appeals Reorganization Act of 1989, which would create a new Twelfth Circuit Court of Appeals for Alaska, Idaho, Montana, Oregon, Washington, Hawaii, Guam and the Northern Mariana Islands.

While I am aware that many supporters of the bill believe that the existing Ninth Circuit is out of touch on substantive issues with those states in the circuit other than California, that is not my primary reason for writing to you. In my opinion it is the procedural difficulties rather than the perceived substantive differences which make the Ninth Circuit unworkable from Montana's point of view. Because the circuit is so enormous, both geographically and in terms of population, participating in a case before the Ninth Circuit is extremely burdensome. Not only is travel expensive and time-consuming, but communicating with the large bureaucracy of the Court is frustrating and inefficient. Cases are handled by small panels of judges whose make-up varies so greatly that decisions are often inconsistent with other Ninth Circuit decisions. Because the caseload is increasing dramatically, the judges depend more on summary procedures and unpublished opinions.

Finally, it is my understanding that it takes the Ninth Circuit on the average of 14.5 months to dispose of a case from the time of filing a notice of appeal to the final decision on the merits. Criminal cases take a good deal longer, if the experience of this office is a valid indicator.

In summary, I believe that the administrative efficiency of the

Ninth Circuit has suffered greatly from its unwieldy size. The problems which have resulted from trying to handle so many cases from such a large population living in such a vast area are serious enough to warrant adoption of S.948, and I urge you to do all you can to assure its passage.

Thank you for your consideration and any assistance you might render.

Sincerely,

Marc Racicot

MARC RACICOT
Attorney General

cc: Justice John C. Harrison

Senator **Heflin**. Thank you.

Now, a panel opposed to it. Senator Cranston.

STATEMENT OF HON. ALAN CRANSTON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator **Cranston**. Thank you very, very much, Mr. Chairman. I will be very brief. The subcommittee has a long agenda. I am pleased to see that a number of distinguished Californians will be appearing as witnesses later, and I am sure they will do an excellent job of pointing out the problems with this bill. Thus, I simply ask that my full statement appear in the record, and I will make a few summary points.

S. 948, the Ninth Circuit Court of Appeals Reorganization Act, is an attempt to fix a problem that does not exist. The current ninth circuit is big, it is diverse, as a Federal court circuit should be. The size and variety of judicial opinion has not, as some would argue, created overworked judges or inconsistent rulings. Rather, most judges on the ninth circuit court of appeals appreciate the diversity of their colleagues and support the current system.

If the circuit were to be divided, however, the situation could worsen in a number of ways. First, I am primarily concerned that under S. 948 the law governing the Pacific area would be divided between two circuits. This division of commercial law could lead to conflicts and inefficiency in the economy of the region. The Pacific States have a commonality of interest in this area of law which should be preserved.

Second is the issue of cost. It would be foolish to run the risk of creating new problems to solve problems that don't really exist, even if we could—and we can not—do it for free. The startup costs in splitting the circuit are estimated at over $5 million. After that, costs would probably be an additional $2.5 million annually. If the workload is indeed a problem, then it makes more sense to increase the number of judges. As the circuit executive of the ninth circuit pointed out, the bill would not diminish the amount of work, it would simply divide the work.

Finally, under S. 948 work for the Supreme Court would likely be increased due to more conflicts occurring between circuits. There is no reason to impose this added burden on the already full schedule of the Supreme Court.

As to the view of those directly involved, the Ninth Circuit Judicial Conference is overwhelmingly against the bill, both judges and attorneys. The bar associations of most States that are affected by this measure are also opposed to it.

There are no compelling reasons, I close by saying, to split the ninth circuit. On the contrary, there are plenty of reasons not to do so. Later witnesses will detail my concerns and the concerns of others. I want to stress there is no need to tamper with a system that is working.

Thank you.

[The prepared statement of Senator Cranston follows:]

Testimony of Senator Alan Cranston

S. 948, Ninth Circuit Court of Appeals Reorganization Act
Senate Subcommittee on Courts and Administrative Practice
March 6, 1990

Mr. Chairman, I am here to testify against the bill under consideration today, S. 948, the Ninth Circuit Court of Appeals Reorganization Act. As I will discuss during my testimony, this bill is an attempt to fix a problem that does not exist. Even more serious, S. 948's supposed solution would create new problems, and at the same time add to the cost of administering justice.

Proponents of this bill -- which would divide the current Ninth Circuit into two circuits -- point to a number of factors that they feel require splitting the Circuit. I will address three of their major points that purport to identify a serious problem in the Ninth Circuit in order to show that there is actually no such problem.

First, supporters of S. 948 state that the size of the current Ninth Circuit has increased the caseload of the Appeals Court, making the judges overworked. Certainly the Ninth Circuit handles a large number of appeals. And if the workload is indeed a problem, then it might make sense to add more judges in order to diminish each individual judge's workload. This would be the most logical and simple approach to combatting a workload problem. Simply splitting the Circuit, however, as a white paper by the Circuit Executive of the Ninth Circuit (henceforth referred to as the white paper) explains "would not diminish the work, but merely divide it." The same number of judges would still be called upon to hear the same number of cases -- they would simply be hearing them in two different circuits. Thus there would be no lessening of individual judicial burden under S. 948. In fact, it is possible that more cases would be filed since decisions in one circuit would not apply to the other.

Second, proponents of the bill also assert that having many judges in the Circuit creates communication difficulties that make it hard to develop a consistent federal caselaw. There is little evidence that such inconsistency actually exists. According to the white paper a majority of judges and lawyers in a survey agreed that the "Ninth Circuit decisions generally adhere to law announced in earlier opinions." Moreover, as the white paper states, "The size of the Ninth Circuit is an asset. Its Court of Appeals is strengthened and enriched by the variety of backgrounds of its circuit judges, drawn from various parts of the circuit. . . . Division of the circuit would make permanent a parochialism that experience led the judges to reject." The judges tried a system of hearing cases only near their residences, but decided that it was better to have a diversity of views. Indeed, one of the strengths of a federal court system is its ability to take an overarching view of the law, not to represent the interests of particular areas.

Lastly, supporters of S. 948 point out that the average time for disposition of a case in the Ninth Circuit is 14.5 months, while the national average is 10.2 months. These figures, however, are misleading. As the white paper points out, of the 14.5 months spent on the average appeal, the amount of time spent in judges' chambers is less in the Ninth Circuit than the national average. The delays stem from case processing problems that are not judicial in nature, and which the Court is in the process of remedying.

From a variety of perspectives, the Ninth Circuit is functioning well. The situation could worsen in a number of ways, however, if the Circuit is divided. Currently, law governing the Pacific area is decided by a single circuit allowing for consistency in federal judicial rulings. As the white paper makes clear, "If the admiralty and commercial law of the Pacific ports were to be divided between two separate and independent Courts of Appeals, conflicts would inevitably develop and predictability of the law would be diminished in this vitally important region." Dividing the Ninth Circuit could lead to conflicts and inefficiency in the economy of the region. This would be a very undesirable result. The Pacific states have a commonality of interest in this area of law which should be preserved.

Another problem that would be created by this legislation is that work for the Supreme Court would likely be increased due to more conflicts occurring between circuits. There is simply no reason to impose this added burden on the already full schedule of the Supreme Court.

Lastly, there is the issue of cost. It would be foolish to run the risk of creating new problems to solve problems that don't really exist even if we could do it for free -- and we can't. The white paper estimates that start-up costs incurred in splitting the Circuit would be at least $5.3 million. After that, costs would be an additional $2.5 million annually. In a time of severe fiscal restraint -- when we can't fund adequately programs to meet basic human needs -- there is no reason to spend money on this unnecessary and unwise proposal.

Over the years, Mr. Chairman, the Ninth Circuit has worked hard to resolve the difficulties it once experienced. Now that it has been reorganized and become more efficient, it makes little sense to destroy the gains of these past few years. As I have testified, there are simply no compelling reasons to do that, and plenty of reasons not to do so. We don't need to tamper with a system that's working.

Senator HEFLIN. Senator Wilson.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator WILSON. Thank you very much, Mr. Chairman. Mr. Chairman, you have heard objections from the proponents of this legislation to the continued existence of the ninth circuit on the basis of its size, and that is presented as the origin of a terrible problem in terms of travel time for judges.

Yet, you have not heard and will not hear the judges who are active on that circuit, not any of them, complaining about that or seeking relief in the form of the division of the circuit.

What I think we may have is perhaps to be found in the pages of the Congressional Record in some rather more explicit statements than have been addressed today. There have been some rather candid expressions of concern that this circuit in terms of the burgeoning environmental caseload was a problem to many of those who appeared before it.

Well, I think what that is really saying, Mr. Chairman, is that this appears to be a case that has attracted a little environmental gerrymandering, and there seem to be few things that so attract Members of the Congress as the opportunity to draw new lines.

There are some who are promoting a split of the ninth circuit who evidently believe from what they have stated in the Congressional Record that they can gain some advantage by drawing new lines, by cordoning off some judges and keeping others.

My friend, the late congressional expert in gerrymandering, well known for his artistry in that regard, Phil Burton, must be looking down on smiling. Though, on the other hand, Phil was also a great environmentalist, and I suspect that while he might be enthused about the artistry involved here, he might not salute the end that is being sought.

That is somewhat with tongue in cheek, but let me just say that it is a real concern, evidently, to those who have represented their reasons for supporting the split in the comments that are reported in the May 9 record of the proceedings of the Senate.

But, Mr. Chairman, quite seriously, I do not like the means or the ends that are involved here. The Federal judicial map should be drawn without regard to the seeking of advantage. Gerrymandering is wrong; it is plain wrong when the target of that is the judicial branch.

Mr. Chairman, I am also told that there is concern—and, again, that is expressed in these same pages of the Congressional Record—that some States encompassed by the ninth circuit feel that California judges are making the law in other States.

Well, not only is that statistically incorrect, but it is also based on a very faulty premise. However, a slight digression that I think should address that concern—according to the Congressional Research Service, there is a less than 1-in-5 chance that a three-judge panel hearing an appeal originating outside California will consist of two or three Californians. In other words, 80 percent of the cases involving litigants from outside California will be heard by a court panel with two or three non-Californians.

But the basic premise, it seems to me, is itself in need of even closer attention. The number of judges on the circuit appointed from California is less than it should be if, in fact, it were commensurate with the number of cases appealed from the district courts in California.

But, again, let us just make this point. First, no judge from California or elsewhere should be making law anywhere in this circuit or in any other. The judges of the circuit are there to construe the law, not to make it. The making of the law is our responsibility.

Second, even in their application of the law, I don't think it has been intended by anyone that the Federal courts should be informed and moved by a sense of localism. Yes, it is true that the circuit court does apply State laws in some instances, but the cases which have come to the Federal courts without a Federal claim, those diversity cases, so-called, constitute less than 4 percent of all the cases heard by the ninth circuit.

Now, if those cases are a concern, then we should abolish diversity, which would have some other beneficial effects, such as reducing the caseload on the district courts, perhaps a more important benefit.

But beyond the weakness of the arguments being used to support the pending bill, its passage would actually harm the Federal interest in uniformity in the application of Federal laws.

To oversimplify slightly, what you have here is an argument in favor of intercircuit division to remedy what is perceived as intracircuit conflict. The Supreme Court is unable to handle more cases. If there were an intermediate court of appeals, which I do not support, then problems created by intercircuit conflicts would not be as significant. But we do not have such a court. So this bill, if enacted, by adding a twelfth circuit, would exacerbate the intercircuit problem.

Rather than undermine uniformity, we should encourage it, whether we are talking about the environmental area or in any other area of litigation. We should have uniform application of the laws on endangered species, on forest practices, on maritime oil spills, on clean air and clean water. The environment itself does not respect State boundaries; it transcends them, as should the Federal law in the area governed by that Federal law.

The Klamath River begins in Oregon, but it ends on the California coast. Should we have a different application at the mouth than at the head waters? There are proposals pending to develop the river. I don't want to see a race to the courthouse. I don't think we should encourage a race to the courthouse to see which circuit, the ninth or the twelfth, will handle the case. If, in the end, some feel that the laws have been misapplied by the courts, they should promote changes in the law, not in the courts.

And I also note that all of the active judges of that court, be they residents of California or outside California, are united in their opposition to S. 948, and that the American Bar Association has recently withdrawn its endorsement of the legislation.

I thank the Chair.

[The prepared statement of Senator Wilson follows:]

STATEMENT OF U.S. SENATOR PETE WILSON
BEFORE THE COMMITEE ON THE JUDICIARY
UNITED STATES SENATE
MARCH 6, 1990

NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT

Mr. Chairman and members of the Committee, it appears that few things attract members of Congress to a hearing better than a proposal to redraw a map, especially if there is a hint of gerrymandering.

Well, that is exactly what is being proposed to the Committee today -- environmental gerrymandering.

Some who are promoting a split of the Ninth Circuit believe that they can gain some advantage by drawing new lines, by cordoning-off some judges and keeping others. The late Congressman Phil Burton must be looking down and smiling -- at least at the device being used.

On the other hand, Phil was an environmentalist. Yet, those who seek to gerrymander the Ninth Circuit are apparently attempting to gain some advantage in the courts against those who want to protect the environment. So, Phil might like the means, but object to the end.

Well, Mr. Chairman, I do not like the means or the end. The federal judicial map should be drawn without regard to the seeking of advantage. Gerrymandering is wrong, but it is plain wrong when the Judicial Branch is added to its list of victims.

Mr. Chairman, I am told that there is concern in some states encompassed by the Ninth Circuit that "California judges" are making law in other states. Not only is this statistically incorrect, it is also based on a faulty premise.

Statistically, the number of judges on the Circuit appointed from California is less than it should be if it were commensurate with the number of cases appealed from the District Courts in California.

As to the bill resting on a faulty premise, let me make two comments. First, no judge, from California or otherwise, should be "making law" anywhere in the Circuit. The judges of the Circuit are there to apply the law, not make it.

Second, even in their application of the law, it is not intended that the federal courts abide by a sense of localism. That is the role of state and local courts.

Yes, the Circuit Court does apply state laws in some instances, but cases which have come to the federal courts without a federal claim -- diversity cases -- constitute less than four percent of all cases heard by the Ninth Circuit. And if these cases are a concern, then we should abolish diversity -- which would have other beneficial effects, such as reducing the caseload of the District Courts.

Beyond the weakness of the arguments being used to support the pending bill, its passage would actually harm the federal interest in uniformity in the application of federal laws.

The Supreme Court is unable to handle more cases. If there were an intermediate court of appeals, then problems created by intercircuit conflicts would not be as significant. But we do not have such a court, so this bill, if enacted, would exacerbate the intercircuit problem.

Rather than undermine uniformity, we should engender it, in the environmental area as elsewhere. We should have uniform application of the laws on endangered species, on forest management, on maritime oil spills, on clean air and on clean water.

After all, the environment does not respect state boundaries; it transcends them: The Klamath River begins in Oregon and ends on the California Coast. There are proposals pending to develop the river. I don't want to see a race to the courthouse to see which circuit -- the Ninth or the Twelfth -- will handle the case.

If, in the end, some feel that the laws have been misapplied by the courts, then they should promote changes in the laws, not in the Courts.

Mr. Chairman, for a more detailed rebuttal to this bill I commend to you the views filed by the Office of the Circuit Executive of the Ninth Circuit. I also note that all of the active judges of that court oppose S. 948, and that the ABA recently withdrew its endorsement.

Thank you.

Senator HELFIN. Senator DeConcini.

STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. Mr. Chairman, thank you for taking the time to listen to Members of the Senate who have, I think, a real interest in this important legislation that is before you.

As you know, my home State of Arizona is part of the ninth circuit. Therefore, as a Senator from Arizona and as a member of the Arizona bar, I have a strong interest in any efforts to change the current composition of the ninth circuit.

Last April, I sent a letter to all the county bar associations in Arizona requesting their comments on the proposed legislation. I received responses from many bar groups, as well as practicing attorneys. I have spoken personally with the Arizona Federal judges and with many attorneys in the State about this issue.

After much deliberation and discussion, I have decided to oppose S. 984 and any other efforts to split the ninth circuit.

There is no consensus in Arizona that any reorganization of the ninth circuit is necessary or appropriate. The comments I have received reflect the opinion that the circuit may indeed be large, but that it is not inefficient. The practicing attorneys did not feel they were experiencing undue delay. Court activities appear to be functioning adequately. Furthermore, legitimate concerns were raised about the lack of jurisprudence a new circuit would have to overcome. Overall, it appears a division is just not justified.

In 1978, Congress reviewed this issue and decided not to divide the ninth circuit, but to allow it to operate as one large circuit. I believe the judgment we made in 1978 was a sound one, and 12 years have not changed this Senator's opinion.

If in 1978 we had indeed decided to limit the number of judges in any circuit to nine, we would find ourselves today in a never-ending process of division and subdivision of circuit courts. If the recently received recommendations of the Judicial Conference of the United States on creating new judges are followed, there would only be one circuit with nine judges or less.

With a limit of only nine judges per circuit, it would take 23 Federal circuits to accommodate all the circuit judges the Judicial Conference now says are needed. The present structure of the U.S. circuit court system is operating adequately and I don't think it should be modified.

The ninth circuit has reported to the Congress four times since 1978 on what steps it has taken to manage such a large court. Three reports reflect that the circuit has been successful in managing its caseload.

Concern has been expressed about the severe backlog of cases in the ninth circuit. With the increase in authorized judgeships on the circuit court of appeals from 13 to 23, the ninth circuit has been able to remain current. Furthermore, splitting the circuit would do nothing to diminish the current workload. The Judicial Conference recommendations include more judges for the ninth circuit and, if even partially enacted, would help to alleviate any backlog.

The ninth circuit has resolved many other concerns raised in the past about the consequences of maintaining such a large circuit. The use of limited "en bancs" to resolve intracircuit conflicts has worked exceptionally well. Today, 11 active judges sit as a limited en banc court. Furthermore, legal scholars from outside the ninth circuit have studied the court's operation and have reported favorable findings.

I supported the appointment of all three of the active judges who serve on the court of appeals who are from Arizona. They inform me that they oppose the division of the ninth circuit. They assure me that collegiality is good; that none of the active judges support the division thereof.

In addition, the Board of Governors of the Arizona State Bar and the Ninth Circuit Judicial Conference have gone on record opposing the circuit division. The American Bar Association, upon an initiative of the Judicial Administration Division, recently rescinded its old position in support of the ninth circuit division.

However, if the subcommittee should move forward with the legislation, I will have to do all I can to slow this down because I believe it is bad for my State, as well as other States, quite frankly. Because California is first and Arizona is second in the number of cases brought, splitting them would be the most effective way to reduce the caseload if it was the judgment of the subcommittee to move on this bill in any fashion. In addition, it would make more sense to have California, Alaska, Washington, and Oregon in the same circuit. These States must resolve claims of maritime law and other problems facing coastal States that are not shared by other States within the ninth circuit.

The bar associations I have heard from concerning this proposal have told me if the split must occur, that I, as a member of the Judiciary Committee, should attempt to see to it that California and Arizona are not in the same circuit.

By maintaining the ninth circuit as one, we can avoid the cost, disruption, and potential waste of creating new offices of circuit executive, clerk, staff attorneys, and other personnel.

I feel very strongly, Mr. Chairman, and I thank you for the time that you have put in on this subject matter. I hope this bill doesn't see daylight.

Senator HEFLIN. Well, thank you. We appreciate the views of the Senators of the States that are involved. The record will stay open for other Senators to submit any statement that they would like to make. Thank you.

[Material submitted by Senators Inouye and Reid follows:]

STATEMENT OF SENATOR DANIEL K. INOUYE
RELATING TO S. 948
THE NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT

Mr. Chairman, I appreciate the opportunity to present testimony regarding S. 948, the Ninth Circuit Court of Appeals Reorganization Act. As I understand it, S. 948 would create a new 12th Circuit Court of Appeals by splitting the 9th Circuit Court of Appeals in two. If enacted, Hawaii would become a part of the 12th Circuit, together with Alaska, Idaho, Montana, Oregon, Washington, Guam and the North Marianas. The new 9th Circuit would be comprised of California, Arizona and Nevada.

Like Senator Gorton, whose concerns about the evolution of jurisprudence affecting his home state of Washington motivated his introduction of S. 948, I too am most concerned about the impact that the division of the Ninth Circuit Court of Appeals would have upon the body of circuit law affecting the State of Hawaii.

I profess no intimate knowledge of the inner workings of the Ninth Circuit. Rather than engage in speculation regarding the caseload, the consistency of decisions, and the effectiveness of the *en banc* procedure of the Ninth Circuit Court of Appeals, I contacted each of Hawaii's federal judges to ascertain their views on the propriety of dividing the Ninth Circuit. I have attached their responses to my statement and ask that they be made a part of the record. Five of the six federal judges oppose any division of the Ninth Circuit. I also contacted the Hawaii Bar Association to solicit their views on S. 948. The Association also opposes such a division.

I defer to the wisdom and knowledge of Hawaii's respected federal judges who have carefully studied this issue and its impact upon the evolving body of circuit law as it relates to Hawaii. I agree with them that a division of the Ninth Circuit would not be in the best interest of Hawaii jurisprudence. For these reasons, I am opposed to S. 948.

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
POST OFFICE BOX 50128
HONOLULU, HAWAII 96850

SAMUEL P. KING
CHIEF JUDGE EMERITUS

June 5, 1989

Honorable Daniel K. Inouye
United States Senator
Suite 722, Hart Senate Building
Washington, DC 20510

Re: S. 948

Dear Dan:

In retrospect my earlier letter was ambiguous. My "devotion" to California, and especially to San Francisco comes into play only if there is to be a division of the Ninth Circuit. I endorse the sentiments expressed by Judge Fong in his letter to you.

As you point out, the prior question is whether the Ninth Circuit should be split into two circuits. On that question, my position is that it should not be. Actually, a division into three or even four circuits would be necessary to accomplish the allegedly "desirable" court of appeals of nine members.

Judge Wallace once suggested that the opposite approach to structuring circuit courts of appeals should be followed. That is, the country should be redivided into fewer large regional circuits. That is probably not politically feasible, but the proposition deserves study.

Respectfully,

Samuel P. King

SPK/rb

cc: Hawaii District Judges

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
POST OFFICE BOX 50128
HONOLULU, HAWAII 96850

SAMUEL P. KING
CHIEF JUDGE EMERITUS

May 15, 1989

Honorable Daniel K. Inouye
United States Senate
Room 722, Hart Senate Building
Washington, D.C. 20510

Dear Dan:

Your attention is invited to S. 5025 offered by Senators Groton, Hatfield, McClure, Murkowski, Burns, Stevens, and Packwood, dividing the Ninth Circuit. It purports to create a new Twelfth Circuit comprising Alaska, Idaho, Montana, Oregon, Washington, Hawaii, Guam and Northern Mariana Islands.

The bill does not list either Hawaii senator as a supporter, which leads me to suspect that Hawaii was included without consulting you. I hope that, if there is to be a division, Hawaii will remain with California, Arizona, and Nevada and not become just a vacation spot for the "new" Twelfth Circuit to hold conferences.

I anticipated this development years ago, as did Judge Pence. Both of us testified that Hawaii should stay with California. I believe the introducing senators are presuming a lot by lumping us along with their states without your support. I do hope you correct this error.

Very respectfully yours,

Sam

Samuel P. King

SPK/rb

cc: Judge Fong
Judge Pence

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

HERBERT Y. C. CHOY
SENIOR UNITED STATES CIRCUIT JUDGE
P. O. BOX 50127
HONOLULU, HAWAII 96850

1989 JUN 23 AM 10 11

June 22, 1989

Honorable Daniel K. Inouye
United States Senate
722 Hart Building
Washington, D.C. 20510

Dear Dan:

Once again Senator Slade Gorton has introduced a bill S.948 to divide the Ninth Judicial Circuit of the United States into two units. This time he has gathered support from some of the senators of the Northwest states. As in the past, Senator Gorton points to the large geographical area of the Ninth Circuit and the 28 active judges of our court (which also has 11 senior judges) and a huge caseload which last year numbered 6,334, as affecting the consistency of justice in the Ninth Circuit and its efficiency.

The bill calls for Arizona, California and Nevada to comprise the new Ninth Circuit and creates a new Twelfth Circuit comprised of Alaska, Idaho, Montana, Oregon, Washington, Hawaii, Guam and the Northern Marianas Islands. (For the immediate purpose of combating the purpose of S.948 to fracture the Ninth Circuit, I am not herein giving any reasons why Hawaii should not be separated from California. I gave you such reasons in 1982 when I pointed out Hawaii's strong historic and economic ties to the San Francisco area in connection with Senator Gorton's 1981 bill to divide the Ninth Circuit.)

While Senator Gorton did acknowledge in his statement on introducing S.948 that the Ninth Circuit is employing innovative administrative techniques and is generally well run, he makes no mention of what those innovative techniques are and the success that the Ninth Circuit has experienced in operating as a large circuit. Those innovative measures devised by the Ninth Circuit include the creation of three administrative units of relatively equal size, with the senior judge in each unit shouldering the administrative functions of the unit. This diffuses the task of administering the entire circuit which formerly rested entirely upon the chief judge of the circuit.

Also, the Ninth Circuit Judicial Council, formerly consisting of all of the active circuit judges in the circuit, has been reconstituted and now consists of four circuit judges, four district judges and the chief judge of the circuit, a total of nine persons rather than 28 active circuit judges. This makes a council small enough to act effectively and yet be sufficiently representative to claim support of all of judges of the circuit.

To avoid conflicting decisions by different three-judge panels of the circuit, all cases having a common issue are entered into a computer and are assigned to the same panel for hearing. If a later panel has a similar issue not yet decided by an earlier panel, the information that an earlier panel has the issue under consideration requires the later panel to await the decision by the earlier panel and then follow it.

In the event that two panels are in disagreement on an issue, the issue can be resolved by a limited en banc court of 11 judges drawn by lot, rather than be heard by the full 28 judges of the circuit court. However, rehearing by the full court is possible after an 11-judge en banc decison has been filed, but thus far no such rehearing has been voted for.

(You may recall that when the old Fifth Circuit was split in 1980 they reheard an en banc case with 25 judges and found that size to be unworkable.)

To minimize the effects of the vast distances between home chambers of the judges, communication by telephone (FTS) is common and transmittal of written messages by computer electronic mail (CCI) is the usual means employed. Each judge's chambers are linked with every other judge's chambers and the court's staff in San Francisco and Pasadena, so that instantaneous messages can be sent simultaneously to all or a lesser number of persons.

Tele-conferencing is increasingly being employed to dispose of certain motions and emergency matters which obviates travel in such instances. It is expected that video conferencing, when its technology is affordable, will obviate much travel to hear arguments of counsel.

The proof that the Ninth Circuit has found ways and means to operate well as a large circuit is in its being current in hearing cases which have been filed and fully briefed. Such currency has prevailed over the last five years. In fiscal year ending June 30, 1988, cases which have been orally argued required only 2.5 months in judges chambers before they were disposed of and cases not requiring oral argument only .9 month before disposition, which times are less in the Ninth Circuit than the national average of 2.7 and 1.0 month respectively.

Another reason for keeping a large Ninth Circuit is that it permits flexible and efficient utilization of its large pool of judges. For example, with years of delay in filling the vacancies in the district court of Hawaii created by Judge Dick Yin Wong's death and later by the creation of a third district judge position for Hawaii, district judges from other states of the Ninth Circuit were regularly assigned to assist the district court of Hawaii in keeping up with its load of cases. Similar assignments of judges throughout the Ninth Circuit have been necesary from time to time. Division of the circuit would foreclose such flexibility of judge-power assignment.

Rather than solve the problem of conflicting decisions if the Ninth Circuit were split into two circuits, conflicting decisions between the two circuits, the Ninth and the Twelfth, could not be resolved by en banc consideration by one circuit, but would add to the load of the Surpeme Court of the United States, which already needs lightening of its growing workload.

I attach hereto a copy of a statement prepared by the Ninth Circuit Executive which responds to S.948 including alleged domination by California judges of the Ninth Circuit and the estimated costs of establishing a Twelfth Circuit.

I request and urge you to oppose S.948 as not being in the best interests of Hawaii, the Ninth Circuit and the Nation. Thank you.

Sincerely yours,

Herb

HERBERT Y. C. CHOY

attach:

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
POST OFFICE BOX 50126
HONOLULU HAWAII 96850

HAROLD M. FONG
CHIEF JUDGE

1989 MAY 23 AM 11: 16

May 19, 1989

Honorable Daniel K. Inouye
United States Senate
Room 722, Hart Senator Building
Wahsington, D.C. 20510

Re: S. 5025

Dear Senator Inouye:

I write to you about a most important matter. Recently S. 5025 was introduced by a number of senators from the northwest states and Alaska which proposes to include Hawaii with them in a new Twelfth Circuit. By now you have also received letters from our Senior Judges Martin Pence and Samuel P. King stating their positions on this matter.

Because it appeared that this is a matter which will seriously affect the body of circuit law as affecting Hawaii, I believe you would want to be fully apprised of the views of all five district judges while you contemplate your support or opposition to this bill or any bill which would divide the present Ninth Circuit into two circuits of any combination of states and/or federal judicial districts.

At the outset, let me advise you of my strong opposition to the senate bill as proposed. I wish to urge you in the strongest terms to oppose any bill which would divide the present Ninth Circuit. I have thought long and hard on this issue and take this position despite my colleagues well considered positions to the contrary. I take solace in Judge King's position that he couches his recommendation in the terms "if there is to be a division". If I read Judge King's position correctly, then I can state that a majority of the five judges are opposed to the current proposed legislation. Judge David Ezra and I are strongly opposed to any division of the circuit regardless of where Hawaii would be placed.

I sincerely believe that Hawaii would be better enhanced as a district to be a part of the largest, most powerful and influential circuit in the country. If Hawaii is tied to California in the newly reconstituted Ninth Circuit, we would be dwarfed by California and totally dominated by their direction. If, on the other hand, Hawaii goes to the new Twelfth Circuit as presently proposed, we would be a part of a less influential circuit whose problems frankly are not similar to ours. Historically, Hawaii's ties are with California. Our cultural heritage and the ethnic diversity of our peoples are more similar to California than with the northwest states. Our law firms and our business firms all have related firms in California. There are many reasons why we should be with California but not without the other states and federal judicial districts which comprise the present Ninth Circuit. Additionally, with all the present states and districts in the Ninth Circuit, we have a much greater pool of judges from which visiting judges could be assigned. It is not only a numerical advantage, but the diversity of judges from large and small districts make it easier to find a visiting judge for particular needs.

In my time as Chief Judge of this district, I have administratively worked with two of the most cooperative and understanding Chief Circuit Judges in James Browning and Alfred Goodwin. Judges Browning and Goodwin have effectively administered this large circuit and Hawaii has never been short-changed in any request I have made to them on behalf of Hawaii.

I have also conferred with the next Chief Judge, Clifford Wallace, on this matter. Judges Browning, Goodwin and Wallace all oppose the division of this circuit and I concur in this position and strongly urge you to support the retention of the Ninth Circuit in its present posture.

I would be glad to answer any questions you may have on this issue. Thank you for your consideration of my position.

Very truly yours,

Harold M. Fong

HAROLD M. FONG

cc: Judge Kay
Judge Ezra
Judge Pence
Judge King

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
POST OFFICE BOX 50128
HONOLULU, HAWAII 96850

ALAN C. KAY
DISTRICT JUDGE

June 6, 1989

The Honorable Daniel K. Inouye
United States Senate
Room 722, Hart Senator Building
Washington, D.C. 20510

Dear Senator Inouye:

Thank you for your letter of May 30, 1989 requesting my thoughts on S. 948 which proposes that the Ninth Circuit be divided into two circuits.

I am not in favor of the proposed division of the Ninth Circuit. I believe that it is in Hawaii's best interest to be a part of the largest and perhaps most influential circuit in our nation. As you may know, Judge Clifford Wallace, who will succeed Judge Alfred Goodwin as Chief Judge of the Ninth Circuit in a few years, met with our local judges to explain his opposition to the proposed legislation. Judge Wallace pointed out that other circuits are also experiencing significant growth, and that it is not practicable to revert to more numerous circuits which would be smaller and more cohesive. I definitely feel that it would be to Hawaii's disadvantage to be swallowed up by California in a smaller circuit comprised of California, Hawaii, and perhaps one or two other states, as such a union would be dominated by California.

In conclusion, the present structure of the Ninth Circuit appears to be workable, notwithstanding that we have our problems just as other circuits have problems. And I note that Judge Fong wrote to you that in his experience as Chief Judge of this district Hawaii has never been short-changed in any requests that he has made on behalf of Hawaii.

Please do not hesitate to contact me should you have any further questions. I do appreciate your concern for our federal courts.

Very truly yours,

Alan C Kay

Alan C. Kay

ACK:ask
cc: Hawaii District Judges

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
POST OFFICE BOX 50128
HONOLULU, HAWAII 96850

CHAMBERS OF
DAVID A. EZRA
UNITED STATES DISTRICT JUDGE

June 12, 1989

The Honorable Daniel K. Inouye
United States Senate
Suite 722, Hart Senate Building
Washington, D.C. 20510

Dear Senator Inouye:

Thank you very much for your letter of May 30, 1989 requesting my position on Senate Bill 948 (to divide the Ninth Circuit into two separate and distinct circuits).

I have given careful thought to this matter and do not believe it would be in the best interests of the State of Hawaii to have the Ninth Circuit divided as contemplated by the pending bill.

While I understand there are those who argue to the contrary, my observation is that the Ninth Circuit appears to be working well as presently constituted. Appeals from the district courts are heard promptly with opinions written and filed in an expeditious manner. From our own point of view, I would note that the Court of Appeals has always been responsive to the needs of our district in terms of providing necessary visiting judges when circumstances required.

I am particularly concerned about how our district would be treated in any proposed division. Placing Hawaii with the so-called "northern districts" as Bill S. 948 proposes would leave us linked in a circuit with states which have little in common either historically or economically with Hawaii. On the other hand, placing Hawaii with California, where our traditional economic ties have been the strongest, would put us at serious risk of being completely overshadowed.

Therefore, I believe Hawaii would be far better off if the circuit were left intact. I can see no real benefit to our state in the proposed division and a host of very real disadvantages to any realistic division.

Again, I wish to thank you for requesting my comments on this matter. Should you wish to discuss it further, I would be more than happy to do so at your convenience.

Very truly yours,

David A. Ezra
United States District Judge

DAE:gg

cc: Hawaii District Judges

MARTIN PENCE
SENIOR JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
POST OFFICE BOX 50128
HONOLULU, HAWAII 96850

June 7, 1989

Senator Daniel K. Inouye
United States Senator
Room 7325 PJKK Federal Building
300 Ala Moana Boulevard
Honolulu, Hawaii 96850

re: S. 948 - Dividing the Ninth Circuit

My dear Dan,

Thank you for your letter of May 30th. As you are aware, the proposed splitting of the Ninth Circuit has been kicking around for many years past. I recall on one occasion some 15-20 years ago traveling up to Portland to testify before a special Congressional commission. At that time, California was going to be split in two, with northern California being joined with all the states north, and southern California with Nevada and Arizona making up the other circuit. The question then was where was Hawaii going: San Francisco or Los Angeles. At that time, I was strong for San Francisco (I still would be over Los Angeles).

In the matter of division, Hawaii's appellate cases are but a small percentage of the total of the present circuit. By the same token, were it not for the immense power of Hawaii's Senators, Hawaii would have but little influence over either the question of division or our position in a circuit, if divided. You, however, Dan, are clearly one of the key forces in the ultimate decision of what will be done with S. 948.

Only last week, Circuit Judge Clifford Wallace was here, following a quiet seminar of the Ninth Circuit judges -- only -- on Maui. Within a year, I think he will be our circuit's next chief judge. He does not want the circuit divided. He believes that the circuits, as presently divided, are becoming too parochial, each more concerned with the problems of the states and the peoples within the states than with the problem of all of the states and all of the peoples of the United States. As Judge King wrote you,

Senator Daniel K. Inouye
Page Two
June 7, 1989

he believes that we should have fewer and larger circuits, not more and smaller. From the standpoint of diversity of thought, of course the larger the number of judges the more views one gets on any problem. Arguably, that can be very good.

It is my opinion that there can be no real collegiality among 28 judges. The very fact that they see each other so seldomly makes each feel less respective to the ideas and positions of the others who might be on the panel with them. I recall only too well when there were but 9 circuit judges and each was always initially most deferential to the opinions of their fellows. That's the great value of "collegiality". It is a condition which certainly does not exist in a 28-judge court.

With the above in mind, I do not know whether a division of the circuit would accomplish very much. The 19 judges in the south will not have improved the collegiality in that circuit very much, and I would opine that the number would continue to increase with a decreasing feeling of deference to other judges. It could well be argued that if the present Ninth Circuit is keeping up with its caseload, then there would be no logic in dividing it into two. The same basic problems would remain in the old circuit.

As you can see, Dan, I do not believe there is any "perfect" solution. If the present system is working, it might be just as well to let it carry on until the time comes that the machinery for operating the great Ninth breaks down. The breakdown will, of course, not come overnight. It can be foreseen in plenty of time to enact legislation to correct it.

"Call 'em as you see 'em, Dan."

Aloha,

MARTIN PENCE
SENIOR JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
POST OFFICE BOX 50128
HONOLULU, HAWAII 96850

May 16, 1989

Senator Daniel K. Inouye
United States Senator
Room 7325 PJKK Federal Building
300 Ala Moana Boulevard
Honolulu, Hawaii 96850

re: S. 5025

My dear Dan,

I just received a copy of Sam King's letter to you regarding Senate 5025 to divide the Ninth Circuit. Sam wrote it without talking to me first.

While, as he says, it appears that neither you nor Spark was invited to support the Bill, I know that Hawaii's two votes will be very important. Sam correctly says that when the matter of division of the circuit came up several years ago, we both wanted to be in California -- not in Los Angeles, however, but in San Francisco. At that time, the division was going to put the northern half of California in what would be the proposed 12th circuit, i.e., California was going to be split in half. As you well know, the present Bill, however, is not going to split California.

Although Chief Judge Browning has done everything possible to make a 28-judge court work, my own examination of the 9th circuit leads me to the conclusion that there are simply too damn many judges on it. As I observed it, there is no collegiality; they squabble within their own ranks over the legal theories that should be the law in the 9th circuit; they wind up all too often completely at odds with the accepted law of the rest of the nation; their reversal rate out of the Supreme Court is the highest of any circuit -- and on and on, all negative.

Senator Daniel K. Inouye
Page Two
May 16, 1989

If the circuit is divided as S. 5025 plans, California, Arizona, and Nevada will initially have 19 judges sitting in that circuit because those three states supply about 75% of all the appellate work in the present 9th circuit court. There would be about 9 in the new 12th. If I were Chief Judge of this court, I would far rather have my cases reviewed by a 9-judge appellate court than a conglomerate 19-judge court.

I believe that all of us out of Hawaii have much closer ties and greater affection for the San Francisco area than for the Seattle. Nevertheless, if S. 5025 becomes law, from the judicial standpoint I personally believe we would be much better served by the smaller court of appeals.

If you have time to listen, I believe Dick Chambers would probably be glad to give you an earful on this subject, when you see us on May 25th.

Me kealoha nui,

MARTIN PENCE
Senior U. S. District Judge

cc: Judge Fong
Judge Kay
Judge Ezra
Judge King

HAWAII STATE BAR ASSOCIATION
P. O. Box 26
Honolulu, Hawaii 96810
Telephone 537-1868

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WALTER S. KIRIMITSU
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EXECUTIVE DIRECTOR
CATHY KELLY

June 26, 1989

The Honorable Daniel K. Inouye
105 Russell Senate Office Building
Washington, D.C. 20510

Dear Sir:

Thank you for apprising me of Senate Bill 948. I appointed two of my board to meet with Chief Judge of the Ninth Circuit Clifford Wallace, Judge Harold Fong, and our Bar Association local lawyer representatives to the Ninth Circuit Judicial Conference. Following that meeting, a report was presented to my board, which unanimously adopted the following resolution opposing splitting of the Ninth Circuit.

RESOLUTION IN OPPOSITION TO SENATE BILL 948

WHEREAS, the Board of Directors of the Hawaii State Bar Association appointed acommittee to investigate Senate Bill 948, which proposes the division of the Ninth Circuit Court of Appeals and the creation of the Twelfth Circuit Court of Appeals;

WHEREAS, the committee has fully apprised the Board of Directors of the facts and issues surrounding Senate Bill 948;

WHEREAS, the Board of Directors has determined that it is in the best interest of all members of the Hawaii State Bar Association to take the strongest possible position in opposition to Senate Bill 948;

THEREFORE, BE IT RESOLVED:

That the Hawaii State Bar Association opposes Senate Bill 948 and any other effort to divide the Ninth Circuit Court of Appeals;

That the Hawaii State Bar Association opposes Senate Bill 948 and any other effort to separate Hawaii from California for purposes of federal appeals; and

That the President of the Hawaii State Bar Association take any and all action he deems appropriate in support of this resolution.

This is an important issue and we appreciate the opportunity to provide input. Thank you for your consideration.

Sincerely,

CWKey

Charles W. Key
President

CWK:el

HARRY REID
NEVADA

United States Senate
WASHINGTON, DC 20510

TESTIMONY

SENATOR HARRY REID

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE

S. 948

March 6, 1990

Mr. Chairman, I wish to express my opposition to S. 948, the Ninth Circuit Court of Appeals Reorganization Act of 1989. The Board of Governors of the State Bar of Nevada has unanimously voted to oppose the bill. The three circuit judges in Nevada, and all of the district judges in Nevada, also oppose any division of the Ninth Circuit.

Of the 27 active circuit judges in the Ninth Circuit, none supports the division of the circuit. At the last Ninth Circuit Judicial Conference, in a secret ballot among all of the judges and lawyer representatives attending, 90 percent voted to recommend that Congress reject S. 948.

The Ninth Circuit performs its vital function with commendable economy and efficiency. Despite large increases in filings, the Court calendar remains current.

The problem facing the Federal Courts of Appeals is not structure, but workload. Dividing the Ninth Circuit would not reduce the number of cases, but merely divide them between two circuits.

In fact, if the Ninth Circuit were divided, the workload would increase. More circuits multiply inter-circuit conflicts, making inevitable the creation of additional federal appellate courts to relieve the Supreme Court.

The size of the Ninth Circuit is actually an asset. The circuit is enriched by the variety of backgrounds and experiences of its judges. This larger groups of judges provides for varied intellectual exchange and avoids a parochialism that could be deadly to the federal court system.

And, finally, the estimated cost of establishing a Twelfth Circuit is about $5.3 million, with $2.5 million needed annually. I believe these estimates are conservative, and could, in fact, be much higher.

Mr. Chairman, with such opposition to S. 948, there seems little justification for its enactment. The Ninth Circuit, as now constituted, performs a valuable function in keeping a consistent body of law in our nine western states. I find no justification for disrupting a circuit that is functioning well. I therefore oppose the passage of this bill.

Thank you.

Senator **Heflin**. We will now call the first panel, which is the Honorable Alfred T. Goodwin, the chief judge of the U.S. Court of Appeals for the Ninth Circuit, Pasadena, CA. Judge Browning, the former chief judge, is accompanying him. We are glad to see both of you.

STATEMENT OF HON. ALFRED T. GOODWIN, CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, PASADENA, CA, ACCOMPANIED BY HON. JAMES R. BROWNING, JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

Judge **Goodwin**. May it please the Chairman, thank you for the invitation to attend. I am Judge Goodwin, the chief judge of the ninth circuit. I have just been in that position a couple of years, and I asked my attorney to come along with me because Jim Browning was chief judge for 12 years during the time when much of the work that has been accomplished was developed and put into effect.

I want to second what Chief Judge Browning said in 1984. We recognize it is the business of Congress, and not of the judiciary, to decide about the organization and the geographic jurisdiction, and so forth, of the courts. But we are glad to be able to express our views when asked to do so.

I am asking leave to file this written statement, together with the exhibits that are attached, and I am not going to read the entire statement. I am going to try to hold it within the 5 minutes.

As the chairman brought up earlier, following a study of several years, which included the report of the committee chaired by Senator Roman Hruska of Nebraska, Congress in 1978 did enact Public Law 95-486, and under section 6 of that law we accepted the challenge to operate a large circuit with the administrative divisions and with the limited en banc court.

The fifth circuit judges, at the same time, did not take advantage of section 6 and requested the next Congress to divide their circuit. The State boundaries, the political conditions, and the preferences of the judges all made division an attractive choice in that area, and Congress proceeded with the enactment of the statute which created the eleventh circuit.

In the ninth circuit, State boundaries, political conditions, and the attitude of the affected judges are completely different from the situation that existed in the fifth circuit in 1980. It is true that the ninth circuit has a growing caseload, and 6,000 cases a year sounds like a substantial caseload. In another 10 years, my successor will look back with nostalgia at 6,000 cases.

The history of Federal jurisdiction in this country shows that caseloads are going to keep on growing, and the courts have the duty of deciding the cases. Our court has utilized effectively both the limited en banc procedure to maintain consistency of decisions and the administrative units procedure envisioned by section 6.

The flexibility of the assignment of district judges from less busy districts to the more heavily districts without going through the intercircuit assignment committee, without bothering Washington, taking the time of the Chief Justice, makes it possible for us to move our judges where they are needed.

One reason our circuit conference has voted time and again against division of the circuit is that the district judges appreciate the flexibility that the large circuit has in moving judges where they are needed.

Now, the system is working well because our court is about average in the length of time in getting cases decided after they are submitted. We are about 4 months slower in our overall time between the time an appeal is filed and the time the decision is filed. And we are working on the delay problem by trying to get the administrative office and other support necessary to complete the automation of our calendars. We were in the middle of a major automation program when the earthquake shook us out of our buildings and we have had to make do, but we are getting along fine as far as decisions are concerned.

The matter of collegiality was mentioned. In my opinion, it is not a problem of the size of the court. It is a problem of how the judges get along together. One reason our judges get along together is not because they are on an ego trip and they want to maintain their turf. It is because they like each other, and they like representing the States that they come from and sitting together in a large court that does have a good deal of variety, a good deal of intellectual stimulation, and a lot of interesting cases.

I have attached to my report the law review article of Professor Hellman, which is the only substantive study that I know of about intracircuit conflict, and Professor Hellman found that we had it under control with our limited en banc procedure.

Some of the sponsors of the bill have talked about delay, and delay is not a function of the size of the court. It is a function of the conscience and the work habits of the individual judges, and you can get slow judges or fast judges on a court of any size.

I see my time has expired. I will be happy to answer questions, if there are any, and if I can't answer them, Jim Browning can.

Senator **Heflin**. Well, I understand in oral argument that you enforce the time limit, is that right?

Judge **Goodwin**. Well, it is interesting to be in this position.

Senator **Heflin**. Well, we are glad to see you are one of the few witnesses that we have had that is willing to confine his remarks to the time allowed. We appreciate that.

Might I ask—they raised the issue of travel. Do you get complaints from the members of the bench concerning travel?

Judge **Goodwin**. No, Mr. Chairman, we do not. As I mention in my written material, we spend about two hours' average time in airports and in the air getting from our home station to the place where we hold court. A lot of our judges spend at least an hour on the freeway every morning getting to work, so I don't agree with those who say we spend more time traveling than we do listening to cases. We travel 2 hours to hear 30 hours of cases.

Senator **Heflin**. To what extent would the proposed division reduce travel time and expenses?

Judge **Goodwin**. Well, I don't—it depends on the division. Any circuit that has Alaska in it is automatically going to be the biggest circuit in the country, and any circuit that has California in it is automatically going to be the most populace circuit in the country.

So if you divide the circuit, you are going to have travel time. It takes about 4 hours to get from San Francisco to Anchorage. It takes about 3 hours to get there from Seattle or Portland.

Senator **Heflin**. You don't have any John Maddens who travel by wheels rather than by air?

Judge **Goodwin**. No. Richard Chambers, who was chief judge for 17 years, wouldn't fly, and he got along fine, but it was a little smaller circuit in terms of caseload.

Senator **Heflin**. The ninth circuit now has 28 active appellate judges. In your opinion, can the ninth circuit continue to add judges and maintain its manageability, or will it, on the other hand, eventually reach limits that cannot be efficiently maintained?

Judge **Goodwin**. Well, I was afraid you might ask that question, and I would say that it is possible that there could be a limit at some time. The California State system has about 70 judges in the intermediate appellate court and they manage all right.

I am certainly not going to invite a caseload that will produce the need for 70 judges in our court, but I think we can add judges and can keep right on working the way we are doing with the limited en banc.

Senator **Heflin**. Judge Browning, we are delighted to see you here. The Omnibus Judgeship Act of 1978 permitted any court of appeals with more than 15 active judges to have administrative units and to perform its en banc functions with fewer than the total number of judges.

Would you care to comment on how you feel the system has worked, and what do you think the significance of that statute is for the future?

Judge **Browning**. I would like to begin, Senator Heflin, by thanking the Congress for giving us section 6. When you gave us section 6 in 1978, our court just 5 years before had the addition of 4 judges, carrying us from a court of 9 to a court of 13.

At the time that bill was passed, we needed 10 more judges just 5 years after we had been given that first addition. Many of us doubted that we could function with a court of 23. I was one of those who testified in favor of a division of the circuit, doubting whether it could function if it were that large.

Congress refused to divide the circuit and instead said, here are your 10 judges; now, you go out and try. And as Chief Judge Goodwin has just told you, we have been trying for the last 12 years, and I think that there is no question but that the effort has been highly successful.

It seems to me that indisputable proof of that is the fact that not 50 percent, not 60 or 70 percent, but between 85 and 90 percent of all of the judges of the circuit and of the representatives of lawyers who practice before the court are against the division of the circuit.

Section 6 saved the ninth circuit, and I suggest to you, sir, that it is the way of the future because, as the Courts Study Committee has just reported, within 5 to 10 years we will need an average of 23 to 27 judges on each of the circuits, as now constituted, and many of them would have to be much larger than that.

That means that within 5 to 10 years, if you are going to keep the circuits fairly small in numbers of judges, you are going to have to have as many as 20. Your only option is to let the courts of appeals grow, and we, I think, operating under section 6, have demonstrated that you do have that option. They can grow.

As Chief Justice Goodwin has said, there is no magic in 9, there is no magic in 15, there is no magic in 28. We can continue to grow and perform effectively. No fundamental change is necessary in the Federal judicial system for at least 20 years.

Senator **Heflin**. Judge Goodwin, in your prepared statement you stated that in the ninth circuit State boundaries, political conditions, and attitudes of the affected judges are completely different from the situation in the old fifth circuit in 1980. Would you elaborate on this?

Judge **Goodwin**. Well, I remember when this was discussed before in an earlier bill, and there was a big question about whether the ninth circuit ought to be divided into two or three circuits because California, with all due respect to my friends from California, among whom I am privileged now to live—California is a problem. It is going to need at least 20 or 25 Federal appellate judges all by itself in the foreseeable future.

In 1980 when there was talk of splitting the circuit, people were saying, well, do you divide California at the Tahachopee Mountains, or do you put Bakersfield with San Francisco or leave it with Los Angeles? There were questions like that, and it was appalling.

The bar said we don't want California divided among different circuits. The judges in Oregon and Washington said, well, we don't want to be divided either because we like being with California.

At that time, and every time it has come up since, our judges have felt—and that is why I said that the attitudes of the judges were different. I know that when John Wisdom was working in the late seventies to hold the fifth circuit together, there were political considerations and geographic considerations that were totally different than the considerations that are involved today, and that is why I said that the geographic boundaries—for example, it was fairly easy for the judges of the fifth circuit to look at a map and say, all right, we can put Texas and Louisiana and Mississippi on one side of the line, and Georgia and Florida and Alabama on the other side, and it will be a fairly even division. And it turned out that way.

But there is no way you can do that on the west coast. If you put the five Northern States in one circuit, they would need seven or eight judges, and they might keep busy. But we would be wanting to borrow them to help out in California.

Senator **Heflin**. Well, thank you. We are delighted to have your testimony.

[Material submitted by Judge Goodwin follows:]

STATEMENT BEFORE THE SENATE JUDICIARY SUBCOMMITTEE ON S. 948

March 6, 1990

Alfred T. Goodwin, Chief Judge
United States Court of Appeals
for the Ninth Circuit

Thank you for the invitation to appear before the subcommittee.

I ask leave to file this written statement, together with eleven accompanying documents to which I will refer in my testimony.

Following a lengthy study which included the report of a committee chaired by Senator Roman L. Hruska of Nebraska, Congress in 1978 enacted Public Law 95-486, § 6 of which permits circuit courts of more than 15 active judges to form administrative divisions and to sit en banc with a number of judges to be fixed by rule of court.

Congress at that time wisely declined to divide existing circuits, and invited the large circuit courts instead to proceed under the enabling legislation of Section 6 and to report back to Congress on the efficiency of the operation of a large circuit. The Ninth Circuit accepted the challenge and for 12 years has operated efficiently in the face of rapid growth.

The Fifth Circuit judges did not take advantage of Section 6, but requested the next Congress to divide their circuit. The state boundaries, the political conditions, and the preference of the affected judges made division an attractive choice, and the Eleventh Circuit was created by Public Law 96-452.

In the Ninth Circuit, state boundaries, political conditions, and the attitude of the affected judges are completely different from the situation in the old Fifth Circuit in 1980.

The Ninth Circuit caseload has continued to grow until the court now has 28 active judges authorized (27 appointed). The court is deciding its cases efficiently and is maintaining a consistent body of federal case law in nine western states covering areas of wide diversity.

The court has utilized effectively both the limited en banc procedure and the administrative units procedure envisioned by Section 6.

Commercial law affecting worldwide maritime trade, aircraft and automobile manufacturing plants, agriculture and the entertainment industry is applied uniformly throughout a vast area of land and water from which emerges about one-fifth of the federal litigation in the United States.

The flexibility of assignment of judges from less busy districts to the more heavily loaded districts without going through the intercircuit assignment routine saves a lot of time and maximizes our ability to use our senior judges most effectively.

That the system is working well is acknowledged by the preliminary report of the Federal Courts Study Committee, commissioned by Congress in 1989 to study the condition of the federal courts and to make recommendations concerning function, structure and organization. The committee reports at page 115 on the success of the Ninth Circuit and suggests that large circuits using modern technology and properly staffed and supported may provide a better answer for the continuing growth of judicial business in the federal courts of appeal than would the proliferation of small circuits.

Copies of sponsors' most recent statements in support of S. 948 were not available as I prepared these remarks, but I have read the press reports, and will try to answer the principal arguments as I understand them.

The first argument is substantially a statistical argument. One published statement[1/] called the statistics of the Ninth Circuit "staggering." As an abstract proposition, I would agree. Six thousand cases a year, and growing, is a heavy workload. I expect that in a few years my successor will look back on our 6,000 filings with nostalgia. Staggering caseloads are in the future for all the circuits. That is the problem that caused Congress to commission the Federal Courts Study Committee.

It is easy to look at our statistics and assume the worst. It is better, I believe, to look at the facts. The facts are that our three-judge panels are disposing of the approximately 2,500 cases each year that survive procedural dismissals and abandonment. Before the October 17, 1989 earthquake, our court

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[1/] Senator Mark Hatfield of Oregon writing in the January 1190 Oregon State Bar Bulletin, at page 6.

was hearing argument promptly after the last brief was filed. In spite of the earthquake and loss of access to our files for a month, we are rapidly regaining the lost ground. The Federal Courts Study Committee is looking to the Ninth Circuit as a possible model for the future.

A second argument is that a large court can't follow its own precedent. The only study of circuit consistency, of which I know, was published by Professor Arthur D. Hellman of the law school of the University of Pittsburgh.[2/] Professor Hellman, who became interested in judicial administration as deputy director of the Hruska Commission,[3/] studied Ninth Circuit en banc procedure over a period of six years. The Hellman report examines the court's ability to deal with straying panels and mutant decisions which crop up sometimes in the best of circumstances.

Professor Hellman reports that over the years the court has implemented an elaborate system designed to maintain intracircuit uniformity, and that the system seems to be working. His conclusion is that evaluation is comparative:

> "Whatever the inadequacies of the Ninth Circuit's efforts to maintain consistent law, and whatever the costs of these efforts, both must be weighed against the costs of alternative solutions to the 'crisis of volume'

[2/] Professor Hellman's study is reported at 56 Univ. of Chicago Law Review, p. 541 (1989).

[3/] Professor Hellman also served on the staff of the Ninth Circuit as chief of the court's staff attorneys for two years while on leave from the University.

> in the federal appellate courts. Occasional inconsistencies in panel decisions may be a small price to pay when judged against the likely consequences of establishing specialized appellate courts--fragmentation of the law, tunnel vision, interest group dominated appointments, and centralization of power. And if the alternative is the establishment of a national court of appeals, with possibly devastating effects on the Supreme Court's performance of its essential function, the large circuit may look almost benign."

56 U. Chi. L. Rev. 541 at 600.

Other published reasons given for dividing the Ninth Circuit are apparently based upon obsolete information or upon anecdotal and generalized assumptions that are difficult to answer. For example, it is said that "too many judges spend more time traveling than hearing cases."[4/] I doubt that such an assumption could have been documented even in the railroad days. A normal panel assignment away from home usually involves about two hours combined in the air and in the airports each way for a 20 to 30-hour stint on the bench. Most judges read case materials during flying time. Many judges spend more time commuting on freeways at home during a week in chambers.

Some sponsors have stated one reason for division is that a large appellate court is slower than a small court in getting out

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[4/] Oregon State Bar Bulletin, op. cit, supra, at page 6.

opinions. Delay is not caused by the size of the court. Delay is a problem of case management by the Clerk's office and time management by three-judge panels. Slow panels drag down the court's average decision time. Small circuits also have slow judges. Slow lawyers, if left to their own devices, can drag down the time between filing and final briefs. Case management in the Ninth Circuit is now speeding up the lawyers at the preargument stage, and we are as successful as other courts in working with the few judges who may be overconsidering a handful of cases.

Another generalization offered by supporters of S. 948 is that a court of 28 active, and a half-dozen hard-working senior judges, suffers from a want of collegiality. The statement is attributed to testimony in support of an earlier Senate bill by a now senior judge5/ who never made any secret, for more than 20 years, of his desire to create a circuit headquarters in Seattle.

A more contemporary view of collegiality is reflected in the recent testimony of Circuit Judge Schroeder of Arizona before the Federal Courts Study Committee in San Diego, January 29, 1990:

> "I have sat on an intermediate appellate court of nine judges and one of twenty-eight. I can testify from personal experience that there is nothing inherently more collegial about a court of nine judges as opposed to a court of twenty-eight. Collegiality is forged by

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5/ Judge Eugene A. Wright quoted op. cit, supra, at page 6.

the professional relationships among the judges, and by the traditions of the institution."

In thirty-five years as a state and federal judge, I have also had some experience with collegiality. After ten years on the Oregon Supreme Court, as one of seven judges, I spent two years on a three judge district court in Portland, about five years on a thirteen judge Ninth Circuit Court of Appeals, and then watched that court grow to twenty-eight. Our large court enjoys the collegiality of friends who have professional respect for each other while stoutly debating each other's opinions. Perhaps because we are numerous, and vulnerable to division and schism, we don't let interpersonal stress get started. We make special efforts to dine together; we plan an annual retreat; we meet and discuss our mutual concerns before partisan or ideological differences begin their corrosive mischief. Any size court can have, or fail to have, an amiable relationship. It all depends on good will and a little effort. The Court of Appeals for the Ninth Circuit has that relationship.

State bar associations have indicated in the attached resolutions that they do not favor the creation of smaller circuits at this time.

Some of the literature in support of S. 948 cites the resolution of the American Bar Association in 1973 to support the Hruska Commission recommendation that the Ninth Circuit (and the Fifth) be divided. At its midwinter meeting February 13, 1990, the American Bar Association's House of Delegates, by a two-thirds vote, rescinded the 1973 resolution, leaving the essentially political question of circuit division in neutral territory.

The bar is keenly interested in the predictability and consistency of the law as it applies to the cases their clients bring to them. The lawyers know that more circuits will produce more, not fewer, conflicting decisions.[6/] These conflicts will not be resolved at the circuit level. The bar is concerned, as are we as judges, when panels lose track of precedent and strike out on their own, but the lawyers call these lapses to our attention in their petitions for rehearing and when we find that we have an intra circuit conflict, we take it en banc and settle it.

The reported reasons for dividing the circuit at this time are that one state, California, dominates the court (the same argument would justify dividing the Second Circuit); and that other regions, being under-represented on the court, suffer from application of federal law that appears to be indifferent to, or unresponsive to, the perceived needs of those regions.

If the latter argument means that certain states want federal law to be applied one way in the south and another way in the north, then the sponsors must be asking for something the legal profession does not usually favor. Balkanization of federal law does not seem to be what federalism is about.

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[6] Noel V. Lateef, Justice on Appeal, The Los Angeles Daily Journal, Report, Sept. 29, 1989 (attached paper).

If the concern is lack of uniformity of decisional law within the nine-state region, S. 948 would be counterproductive on its face because there would then be two circuits writing the federal law of the Pacific Coast, each free to develop its own "law of the circuit." This could only lead to confusion in the federal law of a large section of the country, and to more work for the Supreme Court.

On the score of efficiency in judicial administration, the case for circuit splitting has not been made.

In conclusion, I suggest that it is at best untimely to carve five or six states[7] out of the Ninth Circuit while a committee commissioned by Congress is studying in depth the whole matter of structure and organization of the federal courts and has tentatively recommended that further study be given the Ninth Circuit as a possible model.

I will try to answer your questions.

Enclosures (see list on following page)

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[7] Senators from five states have sponsored the bill. The sixth state, Hawaii, is not represented among the sponsors.

Enclosures:

(1) Resolutions from:

- (1) State Bar of Arizona
- (2) State Bar of California
- (3) Hawaii State Bar Association
- (4) State Bar of Nevada
- (5) Commonwealth of the Northern Mariana Islands Bar Association
- (6) Idaho State Bar Association
- (7) State Bar of Montana
- (8) Federal Bar Assocation of the Western District of Washington

(2) "Time for a new federal circuit in the West: Why the Ninth Circuit should be divided," by Senator Mark O. Hatfield (R-Oregon), reprinted from the Oregon State Bar Bulletin - January 1990.

(3) "Justice on Appeal; A Proposal," by Noel V. Lateef, reprinted from the Los Angeles Daily Journal's "Report" dated September 29, 1989.

(4) "Fourth Biennial Report to Congress on the Implementation of Section 6 of the Omnibus Judgeship Act of 1978," submitted by the Judicial Council and the U.S. Court of Appeals for the Ninth Circuit.

OPPOSITION TO THE DIVISION
OF THE
NINTH CIRCUIT COURT OF APPEALS

At their regular monthly meeting held on July 21, 1989, the Board of Governors of the State Bar of Arizona voted unanimously to oppose Senate Bill 948 and any division of the Ninth Circuit Court of Appeals.

Tom Karas
Tom Karas, President

Feb 6, 1990
Date

THE
STATE BAR
OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CALIFORNIA 94102
TELEPHONE (415) 561-8200

Resolution Adopted by the Board of Governors of the
State Bar of California on
June 24, 1989

RESOLVED that the Board hereby opposes S. 948 which would split the Ninth Circuit Court of Appeals into two circuits; and it is

FURTHER RESOLVED that the Board approves submission of a resolution to the American Bar Association House of Delegates seeking said Association's opposition to the splitting of the Ninth Circuit.

HAWAII STATE BAR ASSOCIATION
P. O. BOX 26
HONOLULU, HAWAII 96810
TELEPHONE 537-1868

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WALTER S. KIRIMITSU
VICE PRESIDENT & PRESIDENT-ELECT
MICHAEL J. Y. WONG, SECRETARY
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ABA HOUSE OF DELEGATES
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DIRECTORS
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CRAIG K. FURUSHO
DIANE D. HASTERT
G. RICHARD MORRY
CHRISTOPHER G. PABLO

EXECUTIVE DIRECTOR
CATHY KELLY

June 26, 1989

The Honorable Harold Fong
Chief Judge
U.S. District Court
P.O. Box 50128
Room C-444
PJKK Federal Bldg
300 Ala Moana Blvd
Honolulu, Hawaii 96813

Dear Sir:

Ms. Diane Hastert and Mr. Alan Van Etten apprised the Hawaii State Bar Association Board of Directors of your recent meeting concerning the proposed division of the ninth circuit court of appeals. Following their report, the board unanimously adopted the following resolution opposing any splitting of the Ninth Circuit.

RESOLUTION IN OPPOSITION TO SENATE BILL 948

WHEREAS, the Board of Directors of the Hawaii State Bar Association appointed a committee to investigate Senate Bill 948, which proposes the division of the Ninth Circuit Court of Appeals and the creation of the Twelfth Circuit Court of Appeals;

WHEREAS, the committee has fully apprised the Board of Directors of the facts and issues surrounding Senate Bill 948,

WHEREAS, the Board of Directors has determined that it is in the best interest of all members of the Hawaii State Bar Association to take the strongest possible position in opposition to Senate Bill 948;

THEREFORE, BE IT RESOLVED:

That the Hawaii State Bar Association opposes Senate Bill 948 and any other effort to divide the Ninth Circuit Court of Appeals,

That the Hawaii State Bar Association opposes Senate Bill 948 and any other effort to separate Hawaii from California for purposes of federal appeals; and

That the President of the Hawaii State Bar Association take any and all action he deems appropriate in support of this resolution.

This is an important issue facing us and we appreciate the opportunity to provide input.

Sincerely,

CW Key

Charles W. Key
President

CWK:el

State Bar Of Nevada

295 Holcomb Avenue, Suite 2 • Reno, Nevada 89502-1085 • (702) 329-4100 • FAX (702) 329-0522
500 South Third Street, Suite 2 • Las Vegas, Nevada 89101-0135 • (702) 382-0502 • FAX (702) 385-2878
REPLY TO ☒ Reno ☐ Las Vegas

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KENT R. ROBISON

MARY ELIZABETH ST. CLAIR
Executive Director

MARGARET G. GREEN
Director • Continuing Legal Education

JOHN E. HOWE
Bar Counsel

RESOLUTION

WHEREAS, the Board of Governors of the State Bar of Nevada has reviewed and considered the proposal to divide the Ninth Judicial Circuit into two circuits, and has considered the merits and effect of the proposal; and

WHEREAS, the Board of Governors believes division of the Ninth Circuit would not be beneficial to the administration of justice; it is therefore

RESOLVED, that the State Bar of Nevada opposes Senate Bill 948, a bill to divide the Ninth Judicial Circuit into two circuits, and for other purposes; and it is further

RESOLVED, that the State Bar of Nevada opposes division of the Ninth Judicial Circuit in any manner and respectfully urges the United States Congress to leave the Ninth Circuit as it is.

DATED: THIS 21st DAY OF July, 1989.

Julien G. Sourwine, President

Commonwealth of the Northern Mariana Islands
BAR ASSOCIATION
Post Office Box 2145
Saipan, MP 96950

Joel J. Bergsma
President

Michael A. White
Vice-President

James S. Sirok
Secretary-Treasurer

AUG 7 1989

RESOLUTION IN OPPOSITION TO SENATE BILL 948

WHEREAS, Senate Bill 948 proposes to divide the Ninth Circuit Court of Appeals and create a new Twelfth Circuit Court of Appeals;

WHEREAS, the general membership of the Commonwealth of the Northern Marianas Bar Association has reviewed and discussed the facts and issues surrounding Senate Bill 948; now,

THEREFORE, BE IT RESOLVED:

That the Commonwealth of the Northern Mariana Islands Bar Association opposes Senate Bill 948 and any other effort to divide the Ninth Circuit Court of Appeals;

That the Commonwealth of the Northern Mariana Islands Bar Association opposes Senate Bill 948 and any other effort to separate the Commonwealth of the Northern Mariana Islands from California for purposes of appeals; and

That the President of the Commonwealth of the Northern Mariana Islands Bar Association and his designees take any and all action they deem appropriate in support of this resolution.

I hereby certify that this resolution was duly adopted by the general membership of the Commonwealth of the Northern Mariana Islands Bar Association at its regular general membership meeting held on July 20, 1989.

Joel J Bergsma

Joel J. Bergsma
President, CNMI Bar Association

IDAHO STATE BAR

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Boise, Idaho 83701-0895

Telephone (208) 342-8958
FAX (208) 342-3799

February 7, 1990

The Hon. James R. Browning
Ninth Circuit Court of Appeal
P.O. Box 547
San Francisco, CA 94101

RE: Idaho State Bar Resolution 89-1

Dear Judge Browning:

This is in response to your inquiry concerning the Idaho State Bar's position on the proposal to split the 9th Circuit Court of Appeals.

Perhaps uniquely, the Idaho State Bar is limited in its ability to take political positions. Idaho Bar Commission Rule 906 requires that we engage in a plebiscite of our members before considering resolutions for changes of law or policy. The resolution process is conducted each November.

Resolution 89-1, considered last fall, was entitled "Bifurcation of 9th Circuit Court of Appeals," and was circulated at the request of both of our U.S. Senators. A copy of the resolution is included with this letter.

The resolution failed by a vote of 978 to 1279.

Please feel free to contact me if you have any questions.

Sincerely,

William A. McCurdy
President
Idaho State Bar

WMC:cp

Enclosure

Resolution 89-1

Bifurcation of 9th Circuit Court of Appeals

PRESENTED BY: The ISB Board of Commissioners

WHEREAS, The Ninth Circuit Court of Appeals is the largest circuit in the country by geography, number of judges, caseload, and population (49 million); and

WHEREAS, The Ninth Circuit is too large to provide the public with the best justice in a reasonable length of time and at low cost to clients;

WHEREAS, The "Ninth Circuit Reorganization Act of 1989, S. 948" has been introduced by Senators McClure and Symms of Idaho, along with Senators Hatfield and Packwood of Oregon, Senators Murkowski and Stevens of Alaska, Senators Burns and Baucus of Montana, and Senator Gorton of Washington;

NOW, THEREFORE, BE IT RESOLVED:

That the Idaho State Bar support U.S. Senate Bill 948 -- the Ninth Circuit Reorganization Act of 1989 which would leave Arizona, California, and Nevada in the Ninth Circuit and create a new Twelfth Circuit consisting of Alaska, Idaho, Montana, Oregon, Washington, Hawaii, Guam, and the Northern Mariana Islands.

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George L. Bousliman

February 7, 1990

Judge James R. Browning
U.S. Court of Appeals
P.O. Box 547
San Francisco, CA 94101

Dear Judge Browning:

Please be advised that the Board of Trustees, meeting on September 15, 1989, went on record in opposition to the split of the 9th Circuit Court of Appeals.

Sincerely yours,

George L. Bousliman

GEORGE L. BOUSLIMAN
Executive Director

GLB/kld

RESOLUTION

WHEREAS, legislation has been proposed and is pending before Congress to divide the 9th Circuit and to create a separate 12th Circuit; and

WHEREAS, the Federal Bar Association ("Association") requested its Legislative Committee to study this proposal and issue a report, and the Legislative Committee did so report, and the report was sent to all members of the Association for review and comment; and

WHEREAS, the by-laws of the Association authorize the Board of Trustees to take positions on important issues affecting the legal profession and the judicial system, and having duly considered the report of the Legislative Committee and the responses from the membership at its regularly scheduled quarterly meeting held on September 26, 1989, now, therefore,

> **IT IS RESOLVED** by the Board of Trustees of the Federal Bar Association for the Western District of Washington that the report of the Legislative Committee of the Association, a copy of which is attached hereto, is hereby approved and adopted as the official position of the Association, and the President of the Association is authorized to communicate this official position to the public and the press as he or she deems appropriate.

ATTEST:

JoAnne Henry

JOANNE HENRY, Secretary,
Federal Bar Association
for the Western District
of Washington

FILE

FEDERAL BAR ASSOCIATION OF THE WESTERN DISTRICT OF WASHINGTON

MEMORANDUM

TO: Members, Federal Bar Association

FROM: Irwin Schwartz, Chairperson, Legislative Committee

SUBJECT: Pending Legislation to Divide the Ninth Circuit (Senate Bill 948)

At the request of the Trustees of the Federal Bar Association, I have reviewed Senator Gorton's legislative proposal to divide the Ninth Circuit into two Circuits. A similar proposal was advanced in 1982, and was opposed by the Federal Bar Association of the Western District of Washington, among others. It failed, as it did when first proposed in 1973. As it did in 1982, I recommend that the Association oppose creation of a new Circuit Court. My reasons for making that recommendation follow. The Trustees invite comments by the membership on the proposal. If you wish to make your views known, please write to me no later than August 28, 1989. I will assemble the material received for the Board's consideration.

Under the current proposal, the Ninth Circuit would consist only of California, Arizona and Nevada, with 19 active judges of the Court of Appeals. A new Twelfth Circuit, consisting of Washington, Oregon, Idaho, Montana, Alaska, Hawaii, Guam and the Northern Marianas, would have only 9 active judges of the Court of Appeals.

After a great deal of study by the Courts, Congress and the Bar, the 1982 proposal was abandoned in favor of administrative efforts by the Ninth Circuit to deal with problems attributable to its size. Under then Chief Judge James Browning, substantial and positive efforts were made. We in Western Washington were principal beneficiaries of the resulting changes, including the Court of Appeals holding monthly calendars in Seattle, and expansion of the Circuit Clerk's office and the Circuit library in Seattle. The backlog of cases and elapsed time from filing of an appeal to decision were reduced markedly. Renewal of the proposal to divide the Ninth Circuit is surprising given the results achieved in the last six years.

I recommend that the Association oppose the division of the Ninth Circuit, for these reasons. First, the size of the Ninth Circuit has been a help to the Northwest and to Washington in particular. The assistance of the more populous Western States will be lost to us if the Circuit is divided. According to the Ninth Circuit Executive's Office, during 1988 alone, 42 assignments of judges were made from the Districts of the proposed Ninth to Districts of the Twelfth Circuits. Over the last several years, Washington has been a principal recipient of help from District Judges in California and Arizona. Without the assistance of those judges, our dockets would have grown and justice would have been delayed for our clients. In the last three years, 16 District Court judges from California and Arizona were designated to sit in the Western District of Washington. In the event the Circuit is divided, help no longer will be available from those Districts. If Western Washington needs help, it will have to look to its smaller brethren in the Twelfth Circuit, Districts too small to be able to spare a judge or judges. Quite to the contrary, as the largest District in the proposed Twelfth Circuit, Western Washington may be viewed as a District from which others must borrow in time of need.[1] That too could have a most unfortunate effect on litigants here.

Second, the fact that the West has been joined in a single Circuit has given regional uniformity to the law and has allowed attorneys to practice throughout the region, to their advantage and to the advantage of their clients. Although some suggest that it is difficult to know the "law of the Circuit" because of the number of opinions published annually, it will be much more difficult to know the law of two separate Circuits. Conflicts arising from contrary rulings on the West Coast may cause commercial havoc in areas such as admiralty and the law of the commercial ports of the Pacific.

Third, we and our clients benefit from the diversity of the bench of the Court of Appeals for the Ninth Circuit. By computer management, the Circuit sees to it that each judge sits the same number of times with each other judge, and judges sit in all parts of the Circuit. That distribution enhances both the appearance and the fact of justice. The appearance of justice is promoted for no one can assert that the panel was chosen to "home town" the case, and both the appearance and fact of justice are promoted when panels reflect the broadest mixture of residence, personal and legal backgrounds of the judges. By reducing the number of available Circuit Court judges from 28 in the Ninth Circuit now to 9 in the proposed Twelfth Circuit, the benefit of the Court's diversity will be lost to us in large measure.

Fourth, although I have reviewed the position papers of the Bill's supporters, I remain convinced that "it ain't broke, so don't fix it." Size alone is not a problem that effects the quality of work done by the Court of Appeals. Size has created administrative difficulties for the Court, but they seem to have been dealt with through the efforts of the judges and their staff. As we move into the 1990's and as the amount of litigation continues to increase, it very well may be that a larger Circuit is in better shape to deal with the number of issues raised. Let me offer an example. Earlier this year the United States Supreme Court upheld the federal criminal sentencing guidelines. Among other things, the new sentencing laws allow appeals by both parties from the sentence imposed. The new sentencing rules dramatically will increase the appellate caseload, and that there are a tremendous number of issues which will have to be addressed in each Circuit. A large Circuit is in a better position to manage the increase in workload, to respond quickly to the new issues and to bring certainty to a very unclear new area of law. It will take far longer for the law to become settled in the smaller Circuits, and the proposed Twelfth Circuit would be among the smallest. A smaller Circuit will not be more efficient in the manner in which it processes its cases or establishes the "law of the Circuit." In addition, splitting the Ninth Circuit would cost millions of dollars for additional infrastructure for the new Court. That money would be better spent by providing additional judgeships.

Fifth, division of the Ninth Circuit probably would renew the debate over whether there should be an intermediate Court between the Courts of Appeals and the United States Supreme Court. Adding a Twelfth Circuit will only increase the number of conflicts among the Circuits, thereby increasing the pressure on the high court.

In sum, the need for division of the Circuit is not demonstrated, but the potential adverse consequences are clear, in this writer's opinion.

For your consideration I have enclosed a "Position Paper" received from Senator Slade Gorton and an opposing memorandum from the Ninth Circuit Executive's Office.

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[1] There would be only 26 active District Court judges in the entire proposed Twelfth Circuit. Ten of them sit in the State of Washington, seven in Western and three in Eastern.

POSITION PAPER
NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT OF 1989
S. 948

> "There is in every body, or polity, or business a natural stage of growth, zenith, and decay." By Polybius, quoted by Erwin N. Griswold, **The Federal Courts Today and Tomorrow: A Summary and Survey** (1979)

> "The familiar refrain that "if it ain't broke, don't fix it," it seems to me, does not and should not characterize federal court administration, and yet it has." William E. Davis, Director of the Administrative Office of Courts of the State of California, 1989 Federal Court Study.

> "To say to the people of their circuits, "this is not constitutional, you and we must obey the law, we must change our way of living," you cannot do that with some huge bureaucracy, even if we're dressed up in black robes." Judge Larry Edmonson, 1989 Federal Court Study.

ISSUE: Whether the Ninth Appellate Circuit is too large to provide the public the best justice, in a reasonable length of time, at low cost to clients, and therefore, should be divided into two circuits, leaving the Ninth Circuit consisting of Arizona, California, and Nevada, and creating a new Twelfth Circuit consisting of Alaska, Idaho, Montana, Oregon, Washington, Hawaii, Guam and the Northern Mariana Islands.

Executive Summary

In a nutshell: the Ninth Circuit is simply too large. This huge circuit requires too much travel, and has too many judges handing down too many opinions that breed inconsistency and lack of uniformity, and require judges and lawyers too much reading, in too little time, encouraging frivolous lawsuits and overburdening the court calendar, which costs the public too much money and delivers too slowly, too little justice.

BACKGROUND

The Ninth Circuit Reorganization Act of 1989, S. 948, as introduced by Senator Gorton (WA) on 5/9/89. Cosponsors are Senators Hatfield (OR), Packwood (OR), McClure (ID), Symms (ID), Murkowski (AK), Stevens (AK), Burns (MT), and Baucus (MT). On 5/17/89, S. 948 was referred to the Senate Judiciary Subcommittee on Courts and Administrative Practice, chaired by Senator Heflin. (Senator Helfin sponsored the legislation that divided the Fifth Circuit in 1981).

S. 948 represents the third time that the Ninth Circuit has faced division. Since the late 1960's, the Ninth Circuit, led by former Chief Judge Browning, has fought to keep the Ninth from being divided. In light of this circuit history, and the memo of the Office of Circuit Executive of the Ninth Circuit opposing S. 948, little support can be expected from the appellate judges.

District judges, however, are much more divided, and in fact, there is unanimous support for S. 948 in some states. While unanimous judicial support from district and appellate judges is ideal, as Judge Browning correctly testified in the 1984 hearing on Senator Gorton's earlier proposal, "our court fully understands and willingly accepts the fact that it is a function of this Congress and not the court to determine what is in the public interest in this connection."

I. SIZE

The Ninth Circuit is the largest circuit in the country by geography, number of judges, caseload, and population of almost 49 million.

A. Judges: The Ninth Circuit has 28 appellate judges, 11 senior circuit judges, 87 district judges, 40 senior district judges, and 62 active and 8 recalled bankruptcy judges. Ten new district judges will be requested in 1990, and soon the Circuit must request additional appellate judges from Congress.

In 1989 Federal Courts Study Committee hearings, Judge Joseph Weiss, Jr. explained that as the number of appellate judges increases, so does divergence in views. He continued that this results in more litigation for the American people, because as the law becomes less clear it's more difficult to conform to the law and good faith disputes occur that must be resolved by litigation. Judge Weiss concluded, "an increase in the number of judges I think adds to the uncertainty of the law, which adds to more litigation."

B. Caseload: In the year ending 3/31/89, 6,659 appeals were filed -- a 15% increase over last year -- and a backlog is forming. By 1990 the Ninth Circuit expects filings will increase to 7,500. Nationwide, the Administrative Office of the U.S. Courts estimates appeals will increase 74% nationwide by the year 2000. Also, increases in quantity are accompanied by increases in the complexity of cases, requiring longer trials. (The United States Court of Appeals: Reexamining Structure and Process After a Century of Growth: Report of the American Bar Association Standing Committee on Federal Judicial Improvements (ABA), 8p.(1989)).

Appellate Judge J. Harvie Wilkinson III states, "Dean Carrington and Dean Griswold both take the court of appeals task for what they called discretionary justice. Dean Carrington says that we have forsaken the function of error correction for discretionary justice - that there is so much law and so much doctrine out there that we can just pluck from here and there to reach the results that we want. If that is the trend, I think it is a very unhealthy one." Ninth Circuit Judicial Conference 1988 Reference Materials: South Carolina Law

Review 38 Vol. 437 (1987). This is clearly the trend in the Ninth Circuit.

The Ninth Circuit's response to the increasing caseload is to increase judges and staff, and establish summary procedures and computer networks, all of which continue to raise the issue of the quality and uniformity of justice on appeal. (ABA 6p.).

C. **Difficulty of Judges and Lawyers to Keep Abreast of the Law:** The large number of opinions make it almost impossible for both judges and lawyers to keep abreast of the law of the Circuit. Ninth Circuit attorneys and judges concluded that the most pressing problem of the Circuit is "the incredible caseload." Both the legal profession and the public suffers from decisions based only on a cursory understanding of the law. (Ninth Circuit Judicial Council Survey, 27p.).

D. **Filing Time:** It takes 14.5 months to dispose of a case from filing notice of appeal to final decision on its merits in the Ninth Circuit. This filing time is much longer than the national average of 10.2 months. (Federal Court management Statistics 1988). The Ninth has the longest median time from filing notice of appeal to the filing of the last brief in a case, 6.5. months. (1988 Ninth Circuit Annual Report 74p.).

A significant minority of Ninth Circuit attorneys and judges disagree that "[t]he time from filing to disposition is reasonable," according to the Survey. Also, the survey noted that the most prevalent comment from attorneys on the Ninth Circuit's procedures is the court should shorten the processing time of appeals. (Ninth Circuit Judicial Council Survey, 7p.)

E. **Travel:** The large geographic area of the Ninth increases the travel necessary to hear and try cases, reducing time for research and consideration, and increasing costs to clients. The public spent $865,000 for judges to travel throughout the Circuit in 1988, which is over a quarter of a million dollars higher than any other circuit.

F. **Costs:** Ninth Circuit expenses for 1988 totaled $25,319,000.00 -- about twenty-percent of the total funding for all circuit courts -- and rising.

G. **Miscellaneous problems resulting from a large circuit:**
   - The American Bar Association found that conflicts regarding opinions within circuits pose the greatest problem in the largest circuits.
   - Size of the circuit reflects reduced communications between judges which also accounts for lack of uniformity in circuit law. (ABA 9p. & Survey 27p.). Judge Weiss notes "[b]ut with a smaller court, the

judges on the court simply know each other better; trust each other more; are more collegial; like each other, I think, in general better; and the result of that is that work goes along smoother. As it goes along more smoothly, it generally goes along faster, and this is a good thing, I think, in terms of, again, handling our caseload." (1989 Federal Courts Study Committee).

- About 60% of the Ninth Circuit cases handed down are unpublished. The large number of unpublished opinions appears to be used in the Ninth Circuit as a means of expediting the large case load of the circuit. Some contend unpublished opinions in the Ninth Circuit also serve to hide inconsistent opinions. James N. Gardner says "In the United States Court of Appeals for the Ninth Circuit, for instance, the persistence of "hidden" conflict between published and unpublished opinions is hard to square with fundamental notions of equal justice." Ninth Circuit's Unpublished Opinions: Denial of Equal Justice?

II. CONFLICTING OPINIONS

A. Three-Judge-Panel Decisions Create Multiple Opportunities for Conflicting Opinions: Three-judge panels created from the 28 judges of the Ninth Circuit increase the opportunity for conflict because of the over 3,276 combinations of panels that may decide a similar issue. (This does not include the significant number of panels composed of senior judges, district judges and judges sitting by designation). Also, the large combination of three-judge panel decisions, and the rapidly expanding caseload, make it difficult for each judge to keep abreast of other decisions within the Ninth Circuit in order to avoid conflicting decisions. (ABA 7, 25-26p.)

It has been said that the Ninth Circuit follows a rule that a decision of a panel in a court of appeals establishes the law of the circuit, and is binding on all subsequent panels of the circuit. However, Erwin Griswold without reservations states of this rule, "It is sometimes said that this is the current practice, but any observer quickly sees that this generally is not the case. In the middle of the last decade, two different panels of the Ninth Circuit reached directly conflicting results on the same issue. A petition on en banc was denied. The issue remained unsettled until the Supreme Court ruled on the issue a few years later." Supra.

As a practical matter, frivolous appeals are frequently brought by attorneys who hope that the "luck of the draw" will provide them a favorable panel. The problem of frivolous appeals in the Ninth Circuit is reflected in the Survey's finding that 92% of judges and 64% of attorneys feel that the court should impose stronger sanctions for frivolous appeals." (ABA 8-9p.; Survey 28p.)

B. **Ninth Circuit Survey on Conflicting Decisions:** The Survey highlighted the problem of inconsistency and lack of uniformity facing the Circuit:

- Ninth Circuit district judges and lawyers reported that 40% of the judges and 31% of the attorneys disagreed with the statement, "Ninth Circuit opinions generally adhere to law announced in earlier opinions."

- 68% of the district judges and 59% of the attorneys, disagreed with the statement, "There is consistency between panels considering the same issue."

Doctrinal conflict within a circuit is known as "intracircuit inconsistency. Professor Stephen L. Wasby states, "It [intracircuit conflict] is a problem because lawyers advising their clients have difficulty deciding which precedents to follow and district court judges are unsure what rules to apply in the cases they must decide." **Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution**, Vanderbilt Law Review 1344 vol.32 (1979).

Recent examples of admitted conflicts in Ninth Circuit law include Judge Betty Fletcher's opinion in U.S. v. Salvador Sotelo-Murillo, F 2nd (9th Cir. 1989), wherein she states the following:

*"There is an apparent split in Ninth Circuit authority over the proper standard of review of the district court's determination that a jury instruction on the defendant's theory of the case is not warranted by the evidence. [] An intra-circuit conflict may be resolved authoritatively only through en banc proceedings. In the meantime, we "are faced with a situation in which we must "make an unsatisfactory choice between two opposing lines of authority, neither of which has an unimpaired claim to being the law of the circuit. **Greenhow v. Secretary of Health & Human Services**, 863 F.2d 633 (9th Cir. 1988)." Supra. See also U.S. v. **Brian Hoyt**, F 2nd (9th Cir. 1989), "It is not necessary to resolve this conflict in this case because the result is the same under either standard."

*Two other lines of cases where judges have noted conflict is U.S. v. **Shewfelt**, 455 F.2d 836 (9th Cir. 1972) and U.S. v. **Friedman**, 455 F.2d 1976 (9th Cir. 1971), which in U.S. v. **Solin**, F.2d (9th Cir. 1989), (before Chief Judge Browning), was denied en banc review though the law of the Circuit is clearly out of sink with almost other every circuit in the country deciding the issue. The dissent notes on this matter "the attorney-client privileges, as a rule of evidence for the federal courts, has an overriding need for national uniformity. Consideration that this circuit's position clashes with that of a majority of other circuits, our order that we rehear this matter en banc was most providently granted."

C. **Role of Review by 11 Appellate Justices:** Generally, review of panel decisions by 11 appellate justices speaking for the entire circuit, limited en banc, is a means of maintaining uniformity. The ABA found, however, that limited en banc decisions are unlikely to eliminate the growing risk of conflicts within a circuit created by an increase in the number of judges. (ABA 26p.) In the Ninth Circuit, appellate judges do not frequently met for limited en banc review, averaging nine meetings per year. Also, this procedure is both an expensive and time-consuming method of resolving conflict. (ABA 7p.)

D. **Danger of Conflicts Between Circuits vs. Conflicts within a Circuit:** Conflicting interpretations of the law within a circuit may be more dangerous than conflicting legal interpretations between circuits. Conflicts between circuits are beneficial to clarify interpretations of the law. Conflicts within circuits, on the other hand, may simply go unnoticed, most especially when there are so many panel decisions. Therefore, a conflict between two circuits is readily apparent, and is beneficial to lead to a clear interpretation of the law by the Supreme Court. (ABA 26p.)

III. **Geographic Representation by Three-Judge-Panels**
Most districts in the circuit, (other than California), will have their cases decided by Judges from another state, because of the great number of panel combinations and high number of judges from California. Therefore, geographic representation and familiarity with regional issues is a problem. The fact that the Survey resoundingly voiced the belief of almost all judges, 84%, that the appellate "Court often does not understand the practical implications of its decisions," is exacerbated by issues peculiar to the region. Also, the ABA stated if the panel of judges is not representative of the entire circuit, the peculiarities of a single district judge may be replaced by the peculiarities of a three-judge panel.

IV. **Regionalism:** The Northwest has developed its own interests that can be better addressed by judges who fully understand the unique issues of the region. A new Twelfth Circuit will also enhance continuity of the law, which suffers when judges make decisions without a full understanding of the issues of the region. Although detractors have commented that admiralty, commercial and environmental law should be uniform on the Pacific Coast, the fact is that the East Coast is divided among five circuits, and no one has claimed a problem with lack of uniformity. (Also, we are fortunately going to have the same judges in the Northwest for some time to come, so there is no reason to assume such a sudden divergence in opinion when the circuit is split).

Judge Browning, looks at regionalism inversely; he states that with large circuits "we can preserve the regionalism in the development of the law, which I submit to you is a vital part of our federal system." However, he does not account for the wide variance in regional concerns within the present Ninth Circuit. Judge Charles E. Wiggins has stated, "But I do know that the fact that we have eleven numerical circuits gives a circuit an opportunity to avoid conflicts, at least within a geographic area that would be more difficult to avoid if the country itself were the geographic area. The country! My goodness! The Ninth Circuit, as you know, goes literally to Japan. That's a big piece of ground and ocean. The problem of avoiding conflicts, I think, would not necessarily be reduced by one court of appeals." 1989 Federal Court Study Committee.

V. **Limited En Banc Procedure:** The Ninth Circuit is the only circuit that uses a limited en banc procedure of 11 appellate judges who determine the law of the circuit, rather than appellate review representing all of the circuit's appellate judges. Judge Weiss noted of the Ninth Circuit's limited en banc procedure, "There are some cases that have such great public significance, it seems to me, that it's really critical that an entire court sit and decide; that the imprimatur of the entire court be placed upon this decision; that the people in the circuit have the right to know that that is really the considered view of the whole court. The court also becomes, I think in general, simply less efficient." 1989 Federal Court Study Committee.

VI. **The Role of Staff in the Judicial Process:** Procedures for deciding cases without oral argument or published opinions, and particularly the role of law clerks and staff attorneys, add to a growing concern that the court of appeals relies too heavily on bureaucratic procedures instead of the attention of individual judges to individual cases. (ABA 8p.) Judge J. Harvie Wilkinson III, states "My primary goal as a judge is to cast an informed vote, because that vote is what affects the parties. One of the dangers is that the crunch of cases is going to lead judges to rely too exclusively on substitutes for briefs and records, particularly, law clerk bench memos." Ninth Circuit Reference Materials 1983: South Carolina Law Review 38 Vol. 437, 1987.

VII. ABA Opinion: The Report of the American Bar Association Standing Committee on Federal Judicial Improvements stated that division of the Ninth Circuit may be justified on grounds of administration and reducing the travel of judges and attorneys.

VIII. Cost: The Administrative Office of the United States Courts of a new Twelfth Circuit will cost approximately $1.4 million, which includes the cost of salaries, benefits, space rental, equipment, supplies and a new headquarters library.

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UNITED STATES COURTS FOR THE NINTH CIRCUIT
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S. 948, NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT

S. 948 would create a new Twelfth Circuit consisting of Washington, Montana, Oregon, Idaho, Alaska, Hawaii, Guam and the Northern Marianas Islands, reducing the Ninth Circuit to California, Nevada and Arizona. The Twelfth Circuit would have 9 active judges. The Ninth Circuit would retain 19 active circuit judges.

I.

Background

S. 948 raises once again the question whether the Ninth Circuit should be divided by carving out a separate circuit comprised of the northwestern states and Hawaii. Similar proposals have been made, and rejected by Congress as not in the public interest, on a number of occasions, beginning as early as 1940.

The last such proposal was presented to the 98th Congress in 1983, but did not reach the floor. Ten years earlier, the Hruska Commission recommended division of the Fifth and Ninth Circuits and bills were introduced to accomplish this purpose. Congress rejected those proposals and instead invited the two circuits to initiate new approaches to determine if a large circuit could work effectively. To assist in this effort, Congress provided in Section 6 of the Omnibus Judgeship Act of 1978 that any Court of Appeals having more than 15 active judges could divide itself into administrative units and perform its en banc function with less than all of its judges. Congress invited the large circuits to report to Congress on their progress and recommend additional legislation that might be necessary to provide for the effective administration of their courts.

The Fifth Circuit chose to request division of the circuit, and Congress acquiesced. The Ninth Circuit accepted Congress's invitation and embarked upon an extensive program of administrative innovations.

The Ninth Circuit submitted its first report to Congress in 1982 describing in detail the changes undertaken to manage a large appellate court. The second report, in 1984, noted substantial progress but acknowledged the challenges still to be met. The third report submitted in 1986 answered the question posed by Section 6 -- stating emphatically that a large circuit can perform well and that no further legislation is necessary to accomplish that result. That answer stands today. The Ninth Circuit is presently preparing and will submit to Congress its fourth report fully documenting the reasons why there is no need to fragment the Ninth Circuit at this time.

II.

Objections to S. 948

1. There is no administrative need to divide the Ninth Circuit. It is working well. It is a source of pride that this 125 year old judicial institution performs its vital function with commendable economy and efficiency.

In calendar year 1988, the Court of Appeals terminated 6170 appeals, 17.7% more than the previous year. The Court was able to meet its workload despite three unfilled vacancies representing a total loss of over 50 months of judicial time. Despite a 20% increase in filings during the same period, the Court calendar remains current. Once a case is fully briefed by counsel, it is scheduled for the next calendar. This workload has been carried by hard work and innovations in use of staff.

2. Splitting the Ninth Circuit, or other circuits, would not address the real problem facing the Federal Courts of Appeals.

The problem is not structure, but workload. Splitting the Ninth Circuit would not diminish the work, but merely divide it. The number of cases that must be heard would remain at least the same whether there is one circuit or two circuits in the western United States.

3. Creating more circuits would increase the workload of the U.S. Supreme Court. More circuits multiply inter-circuit conflicts. Implicit in the remarks of the sponsors of S.948 is the hope that federal law in the pacific northwest will differ substantially from federal law in California, Nevada and Arizona (Congressional Record May 9, 1989, P.P. 5026-5028). Circuit conflicts would make inevitable the creation of a new tier of federal appellate review or the creation of additional specialized federal appellate courts to relieve the Supreme Court.

Growth followed by division, followed by another period of growth and another division would be an endless process. The Administrative Office of the United States Courts estimates the number of appeals filed will increase from 38,000 in 1988 to 66,000 in the year 2000, an increase of 74%. Increases in filings of that magnitude will require additional judgeships. The Fifth Circuit now has 16 circuit judges and has requested a 17th. If the ceiling for judges per circuit is 15, as proponents of S. 948 argue, the Fifth, divided in 1980, should now be divided again. Indeed since there would be at least 21 circuit judges in the new Ninth Circuit created by S. 948, the Ninth would have to be divided immediately. If Congress passes the pending judgeship bill five of the twelve circuits will have 15 judges or more.

4. The proponents of this legislation argue that the Judicial Conference is on record opposing courts of appeals with more than 15 judges. That position was taken in 1972 -- almost two decades ago. By adopting the Omnibus Judgeship Act of 1978, Congress recognized that courts of appeals with more than 15 judges were practicable. Subsequently, the Conference and the

Congress confirmed that view by authorizing additional judgeships for both the Ninth and Fifth Circuits.

5. The size of the Ninth Circuit is an asset. Its Court of Appeals is strengthened and enriched by the variety of backgrounds of its circuit judges, drawn from various parts of the circuit. Immediately following the passage of Section 6, the Court experimented with a program in which each judge sat and heard cases only in the areas of the judges residence. After six months, the judges overwhelmingly voted to discontinue the experiment. The loss of intellectual interchange with a larger group of judges drawn from a greater variety of backgrounds outweighed any perceived benefits. Division of the circuit would make permanent a parochialism that experience led the judges to reject.

6. Because of its size, the Ninth Circuit has a large pool of district judges available for assignment to districts that develop a temporary but acute need for help. For example, district judges were recently assigned temporarily to the district of Alaska to assist in the handling of the trial calendar because Alaska had a judicial vacancy and one of its remaining judges was committed to a year-long criminal trial. Judges throughout the circuit assisted the district of Hawaii when two of the three authorized judgeships remained vacant for a number of years. In recent years, the greatest need for help has arisen in districts that would be separated from the Ninth to create the Twelfth. In the last year, 42 individual assignments have been made from districts in the proposed Ninth to districts in the proposed Twelfth.

7. Preservation of a single circuit with a single court of appeals has resulted in the maintenance of a consistent and predictable body of federal law throughout the western states and the Pacific maritime area, facilitating trade and commerce and contributing to stability and orderly progress. If the admiralty and commercial law of the Pacific ports were to be divided between

two separate and independent Courts of Appeals, conflicts would inevitably develop and predictability of the law would be diminished in this vitally important region.

8. The Ninth Circuit has taken the initiative in experimenting with the innovative procedures authorized by Congress to foster effective administration and to maintain a consistent body of law. A few examples are provided below:

- Three administrative units of the Court of Appeals were established pursuant to Section 6. The Northern Unit consists of Washington, Oregon, Montana, Idaho and Alaska; the Middle Unit encompasses Hawaii, Northern and Eastern California, Nevada and Arizona; the Central and Southern districts of California comprise the Southern Unit. Each of these units is led by an Administrative Chief Judge who is responsible for the administrative activities within the region.

- The Ninth Circuit exercised the authority conferred by Section 6 to create a limited en banc court. Cases taken en banc by a majority vote of the whole court are decided by a panel of 11 judges drawn by lot in each case. This procedure has been effective in maintaining a consistent body of law throughout the circuit.

- Following passage of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, the Ninth Circuit reconstituted the Judicial Council to include 5 circuit judges including the Chief Judge of the Circuit and 4 district judges from throughout the circuit. Representatives of the circuit's bankruptcy judges, magistrates and senior judges participate in all deliberations of the Council. The Judicial Council in turn created an administrative structure in which all elements of the system throughout the circuit -- circuit judges, district judges, bankruptcy judges, magistrates, supporting personnel and members of the bar -- actively participate in efforts to improve the administration of the courts within the circuit. By reorganizing in this way, the Ninth Circuit has created a unique partnership among federal judicial officers and members of the bar in the western United States to accomplish this purpose.

- Only the Ninth Circuit exercised the authority granted by Congress to create a Bankruptcy Appellate Panel. This highly successful court of experienced bankruptcy judges has developed a body of uniform, high-quality bankruptcy precedents, and relieved both the district courts and the court of appeals in the Ninth Circuit of a substantial burden.

- The Ninth Circuit initiated the movement that led to the present pilot project to determine the feasibility of decentralizing responsibility for financial management to the courts spending the funds. The results have exceeded expectations; each pilot court has reported substantial savings over its prior level of expenditure.

III.

Responses to Statements by Senators on the Introduction of S. 948 (Cong.Rec. page S5027 - 5/9/89)

1. Consistency of the Law -- Senator Hatfield notes that in a survey of judges and attorneys conducted by the Ninth Circuit, a majority of judges and lawyers disagreed with the statement "[t]here is consistency between panels considering the same issue." A different picture emerges in responses to other questions in that same survey. For example, a strong majority of both judges and lawyers agreed with the statements that the "Ninth Circuit decisions generally adhere to law announced in earlier opinions" and that the "quality of published opinions is good."

All appellate courts that sit in panels face the problem of maintaining inter-panel consistency. However, the Court of Appeals for the Ninth Circuit has dealt with this common problem directly and effectively. All fully briefed cases are reviewed by court staff attorneys. The issues in the appeal are coded for entry into the computer. Cases that raise the same issue and become ready for calendaring at the same time are assigned to the same panel. The computer is also used to inform later panels of similar issues heard by earlier panels but not yet decided. The first panel that gets the issue decides it.

If conflicts nonetheless arise, a limited en banc procedure is employed to decide them. The success of these efforts is indicated by the very few cases that had to be taken en banc. A follow-up, more detailed, survey of the judges and lawyers of the Ninth Circuit is now being conducted to identify any inconsistent lines of authority that remain. Preliminary results indicate that few such conflicts exist.

2. Domination by California: Sponsors assert that the Northwest States "are simply dominated by California judges and California attitudes." The underlying premise of the argument is that circuit judges drawn from different parts of the circuit decide cases differently. Anyone familiar with the work of the

court knows this is not true. Panels are drawn by computer from a pool that includes all judges. The program is so arranged that each judge sits with every other judge in the pool an equal number of times, and sits in the places where the Court sits (principally, Seattle, Portland, San Francisco, and Pasadena) an equal number of times. It is rare that all three judges on a panel will be from the same area. Judges sensitive to local perception may be on any particular panel and will almost certainly participate in the development of the law in an area of sufficient importance to come before the court in more than a single case. In view of these facts, it would be virtually impossible to correlate decisions with the geographic origins of the judges. The proponents of S. 948 have made no effort to do so.

3. Median Times: A sponsor noted that the time required to process an appeal in the Ninth Circuit is 14.5 months. Of that 14.5 months, only 2.5 months [for orally argued cases] and .9 months [for submitted cases] is spent in judges' chambers -- the time from submission to disposition. These steps requires less time in the Ninth Circuit than the national average. This source of delay is not judicial. The greater portion of the 14.5 months is spent by court reporters and attorneys in record preparation and briefing to get the case ready for submission for decision. The work of court reporters and attorneys requires about 50 days longer in the Ninth Circuit than the national average. Much of this delay is caused by economic conditions that are peculiar to Los Angeles. While these delays are a statistical problem for the whole circuit, they do not impact Seattle and Portland. The Court has taken steps to reduce this delay in the non-judicial aspects of case processing and is planning others. The Court anticipates a substantial shortening of the disposition time during the next year.

4. Diversity Cases: Senator Packwood stated that splitting the circuit ". . . will allow judges and their clerks to develop

an even greater mastery of the state laws which their circuit encompasses than the high level of expertise which they currently exhibit." The number of diversity cases that reach the Ninth Circuit is small. According to Administrative Office statistics for the year ending June 30, 1988, the Ninth Circuit decided only 223 diversity cases. Almost three fourths of those cases were affirmances of the district judges who were practitioners in the state law. The remaining almost 6,000 cases involved issues of federal law.

5. Supreme Court Reversal Rate: Senator Packwood suggests division would reduce the reversal rate by the Supreme Court. In the 1986/1987 Supreme Court term, the Ninth Circuit stood tenth among the twelve circuits in reversal rate, with a 47% reversal rate compared to the national average of 62%. Only the First (33%) and Third (46%) Circuits reversal rates were lower. It is interesting to note that splitting the old Fifth Circuit did not reduce the work of the Supreme Court for the region now served by the Fifth and the Eleventh Circuits.

IV.

Etimated Costs of Establishing a Twelfth Circuit

Preliminary estimates of the major additional costs associated with splitting the Ninth Circuit and establishing a new Twelfth Circuit as envisioned in S.948 suggests that; at minimum the Judiciary could experience roughly $5.3 million in start-up costs and $2.5 million annually in current dollars. These estimates are conservative in that they assume that most new operating costs in the Twelfth Circuit will be offset by corresponding reductions in the smaller Ninth Circuit. They further assume virtually no space remodelling to accommodate new Circuit operations other than construction of new library space and new judges' chambers. The most significant cost factors associated with division include:

- Costs associated with at least two potential new judgeships indicated by projected filings in the new Twelfth Circuit ($658,000 annually plus roughly $1.1 million in remodelling costs for new chambers).
- Upgrading space expansion and related equipment and furnishings - principally associated with upgrading of the current Seattle library space ($3.1 million).
- Upgrading of main library and chambers collections ($1.1 million).
- Annual space rental and maintenance costs ($1.1 million annually).
- Net additions to existing staff ($0.7 million annually) and new computer systems ($0.1 million).

Conclusion

The creation of additional regional circuits will create more problems for the federal courts than will be solved. The federal courts are federal, not local, not parochial. Their responsibility is to enforce the nation's federal law. S. 948 would defeat that purpose. Any local benefits would not outweigh the economic and institutional costs of fragmentation.

Time for a new federal circuit in the West: Why the Ninth Circuit should be divided

By Sen. Mark O. Hatfield (R-Oregon)

"The voice of great events is proclaiming to us, Reform, that you may preserve."

Lord Thomas Babington Macauley

Whether measured by number of judges, caseload, geography or population, the Ninth Circuit Court of Appeals is the nation's largest circuit. Its size has created serious problems: too many judges spending more time traveling than hearing cases, a growing backlog of cases which threaten to bury each judge, a dangerous inability to keep up with current caselaw, a breakdown in judicial collegiality and, most importantly, a failure to provide uniformity, stability and predictability in the development of federal law throughout the region.

It is increasingly clear that these problems cannot be solved by reforms already implemented by the court. Instead, in the interest of more thoughtful decisions and swifter justice for all of us who live in the West, the time has come to divide the Ninth Circuit.

Toward that end, I joined seven of my colleagues in introducing S. 948, the "Ninth Circuit Court of Appeals Reorganization Act of 1989," earlier in 1989.[1] If passed into law, this legislation would create a new Ninth Circuit comprised of Arizona, California, and Nevada and a new 12th Circuit comprised of Alaska, Idaho, Montana, Oregon, Washington, Hawaii, Guam, and the Northern Mariana Islands. The following article briefly describes the problems of the Ninth Circuit and explains why its division is the only way to solve them.

Problems of the Ninth Circuit: size and caseload

The size of the circuits and their caseload have long been a concern of Congress, the bar and the Judicial Conference of the United States, which had agreed with its Committee on Court Administration in 1971 that "to increase the number of judges in a circuit beyond 15 would create an unworkable situation."[2] To address the concerns of the conference, Congress in 1972 established a 16-member Commission on Revision of the Federal Court Appellate System, known as the Hruska Commission (after its Chairman, Nebraska Sen. Roman L. Hruska).[3] In its 1973 report, the commission stated:

> ". . . [the] size of the Court (13 authorized judgeships since 1968) and the extensive reliance it has been required to place on the assistance of district and visiting judges have threatened its institutional unity. Attorneys and judges have been troubled by apparently inconsistent decisions by different panels of the large Court; they are concerned that conflicts within the Circuit may remain unresolved."[4]

Although in 1980 the Congress followed the commission's recommendation that the Fifth Circuit be divided,[5] it did not follow the commission's similar recommendation for the Ninth Circuit.[6] Yet in years since, the arguments for a division have grown stronger still.

Testifying before the Senate Judiciary Committee in 1984, Circuit Judge Eugene Wright argued that a federal appeals court cannot be effective with more than nine judges.[7] Throughout his testimony, Judge Wright argued that a circuit should be configured so that judges can be drawn from regions with common legal problems, that there should be close personal relationships and collegiality among the judges, and that there should be consistency in the circuit's decisions. Judge Wright also observed that "some of the judges of the Ninth Circuit are now no longer able to remain current with the law of the Circuit as it develops," and that because of "the volume of this printed material, judges are obliged to rely on law clerks, staff attorneys, librarians, and the eternal hope that their next opinions do not stray too far from the current law of the Circuit."[8] Today, the arguments for dividing the Ninth Circuit grow even stronger.

The statistics relating to the Ninth Circuit are truly staggering: Nine states and two U.S. Territories comprising more than 40 million people fall within the Circuit's jurisdiction. To handle this vast area, the Circuit uses 28 appellate judges, 11 senior circuit judges, 87 district judges, 40 senior district judges and 62 active and 8 recalled bankruptcy judges (not to mention the legions of law clerks and support staff).

The caseload of the circuit is equally immense, with 6,621 cases filed in 1988 alone, an increase of more than 20 percent since 1987. If the present rate of growth in federal appeals continues, the caseload of the circuits, particularly the Ninth Circuit, will likely double in the 15 years from 1980 to 1995.

The most obvious result of this workload is delay and backlog. Currently, the Ninth Circuit takes 14.5 months to make a final decision from the time of filing the notice of appeal.[9] That delay is much longer than the national average of 10.2 months.

Another consequence of this increasing caseload, and the volume of decisions which result, is a shift in the courts' adjudicative role. As observed by Fourth Circuit Judge J. Harvie Wilkinson III, "Dean Carrington and Dean Griswold both take the court of appeals to task for what they called discretionary justice. Dean Carrington says that we have forsaken the function of error correction for discretionary justice — that there is so much law and so much doctrine out there that we just pluck from here and there to reach the results we want. If that is the trend, I think it is a very unhealthy one."[10]

The circuit's response to this increasing caseload has been to add more judges and support staff, establish summary proceedings and develop computer networks. That response may provide temporary relief, but these measures focus on bureaucratic procedures rather than on the attention of individual judges to individual cases. The size of the circuit now works against the original purpose of its creation: the uniform, coherent and efficient development of federal law in the region.

Obviously, merely adding more judges to the Ninth Circuit to handle the increased caseload is not the answer. As stated in a March 1989 report by the American Bar Association's Standing Committee on Judicial Improvements, "The side effects of the standard cures for increasing caseload may prove to be as serious as the original disease."[11] This lack of coherence and unity in the Ninth Circuit's decisions and the resulting inability of the Court to speak with one voice is perhaps the most dangerous side effect now being experienced by those of us who live within its jurisdiction.

Problems of the Ninth Circuit: intracircuit conflicts

That lack of coherence and unity is the result of a growing incidence of inconsistency or conflict among the decisions of the three-judge panels. With 28 circuit judges on the Circuit, the number of possible combinations of panels within the Circuit totals 3,276. That staggering number becomes much higher when one includes the use of senior circuit judges, district judges and judges from other circuits. Naturally, with the increase in the number of possible panels comes the greater probability of conflict between each panel and the greater difficulty of keeping abreast of other panel decisions in order to avoid those conflicts.

A recent Ninth Circuit Judicial Council survey of district court judges and attorneys regarding the Ninth Circuit highlights the problems of inconsistency and lack of uniformity. This survey found that 40 percent of the judges and 31 percent of the lawyers polled disagreed with the statement, "Ninth Circuit opinions generally adhere to law announced in earlier opinions." A clear majority of both groups, 68 percent of the judges and 59 percent of the attorneys, disagreed with the statement, "there is consistency between panels considering the same issue."[12]

As recently pointed out by Stephen L. Wasby, professor of political science at the State University of New York in Albany, this type of intracircuit inconsistency poses a problem "because lawyers advising their clients have difficulty deciding which precedents to follow and district court judges are unsure what rules to apply in the cases they must decide."[13] Intracircuit conflicts are far more problematical than conflict between the circuits because of the manner in which those conflicts are addressed. As stated by the American Bar Association's Standing Committee on Federal Judicial Improvements:

> "Conflicts among the circuits might be valuable because they reveal the consequences of taking one position rather than another, but the inability of a circuit to adhere to a single position obscures what those consequences are. Intracircuit conflicts are also more likely to escape notice than intercircuit conflicts. A panel opinion can be fairly frank about rejecting or interpreting narrowly and unsympathetically the decisions of another circuit. It is likely to be far more circumspect in its treatment of an earlier decision of another panel of the same circuit, which would otherwise constitute binding authority."[14]

This problem of intracircuit conflict is exacerbated by the Ninth Circuit's use of limited *en banc* review, precisely because less than the full court is involved.

Traditionally, conflict within a circuit is eliminated by decisions *en banc*. All of the judges are involved in the proceedings, from the review of briefs to oral argument to the formulation of the opinion. With the limited *en banc* procedure, however, only 11 of the 28 judges are involved. Naturally, the decision of the Court becomes less authoritative. Thus, in the case of the Ninth Circuit each decision reached by a limited *en banc* court has less impact upon subsequent similar cases.[15]

Third Circuit Judge Joseph F. Weis, Jr., chairman of the 1989 Federal Court Study Committee, agrees with this assessment. Of the Ninth Circuit's use of limited *en banc* procedures, he notes "[t]here are some cases that have such great public significance, it seems to me, that it's really critical that an entire court sit and decide; that the imprimatur of the entire court be placed upon this decision; that the people in the circuit have the right to know that that (sic) is really the considered view of the whole court. The court also becomes, I think in general, simply less efficient."[16]

Specifically because of these concerns, the Fifth Circuit refused to use this limited *en banc* procedure to eliminate conflicts in the law, opting instead for a division of the Circuit. Rather than eliminating uncertainty, the Ninth Circuit's use of limited *en banc* review actually perpetuates it. During the 1984 Congressional hearings regarding the division of the Fifth Circuit, Chief Judge Charles Clark stated that the Fifth Circuit was of the view that "the law of the circuit would be more consistent if all of the judges charged with making that law participated in the *en banc* decisions."[17]

Problems of the Ninth Circuit: inadequate regional representation

A more subtle, but increasingly important, problem with the current size of the Ninth Circuit is the lack of geographical balance on the court. Both the Northwest and the Southwest have different interests, demographics and experiences. Judges who lack a full understanding of the regional milieu out of which legal issues arise are hindered when making decisions which involve those issues. As stated by Stan Pitkin, former U.S. Attorney for the Western District of Washington, before the Hruska Commission, ". . . Judges whose background and experience lie in places a thousand miles from a given court are unlikely to have a full appreciation of regional aspects of an issue, even if they are aware of them."[18]

Because of the dominance of California, which generates more than 60 percent of the Ninth Circuit's annual caseload, a majority of the Court is from California. Presently, there are no judges from Alaska, Idaho or Montana. This lack of geographical balance is particularly troubling when, as now, the Northwest is developing its own unique legal issues in

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such areas as energy, commercial and environmental law. This need for greater regional representation is demonstrated by the fact that the East Coast is comprised of five federal circuits.

Conclusion

When is a circuit court too large? Admittedly, it is a difficult line to draw, but at some point this question must be answered. There is a growing awareness in Congress that the problems which plague the Ninth Circuit cannot be addressed by simply adding more judges.

If the experience of the Fifth Circuit, which was divided into the new Fifth and Eleventh circuits in 1984, is any guide, there are a great many benefits to be derived from such a division. As Chief Judge Clark of the Fifth Circuit stated in 1984 about the benefits from that Circuit's division:

> ". . . the principal benefit gained remains that judges, lawyers, and litigants can better cope with a smaller, more predictable universe of case law. Effective conduct and management of litigation requires mastery of this corpus juris. Circuit judges must know its status on a daily basis to keep the law consistent."[10]

Whether the decision to divide the Ninth Circuit is made now or in the future, the problems associated with its current operation are serious and will require additional Congressional inquiry.

There is a growing awareness in Congress that the problems which plague the Ninth Circuit cannot be addressed by simply adding more judges.

Footnotes

The Senator wishes to acknowledge the assistance of his legal counsel, James A. Flaherty, in the preparation of this article.

[1] S. 948, 101st Congress, First Session. Co-sponsors include Senators Gorton (R-Washington), McClure (R-Idaho), Murkowski (R-Alaska), Burns (R-Montana), Stevens (R-Alaska), Packwood (R-Oregon) and Baucus (D-Montana).

[2] *Reports of the Judicial Conference – Report of the Administrative Office, U.S. Courts, 1971* at 81.

[3] Established by Act of October 13, 1972, 86 Stat. 807, the Commission, chaired by Sen. Roman L. Hruska, was composed of four members appointed by the President, four by the Senate, four by the House, and four by the Chief Justice. *Id.*, Section 2. An American Bar Association study had earlier recognized that both the Fifth and Ninth Circuits may have to be divided due to the large number of judges needed to hear the cases before the circuits. American Bar Association, *Accommodating the Workload of the United States Courts of Appeals: Report of Recommendations* (1968) reprinted in *Commission on Revision of Judicial Circuits: Hearings on H.R. 7378 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 92nd Cong., 1st Sess., Ser. No. 17, 32-44 (1972).

[4] Commission of Revision of the Federal Court Appellate System, *The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change* (December 18, 1973), reprinted at 63 F.R.D. 223 (1974), at 12.

[5] Act of October 14, 1980, 94 Stat. 1994, authorized the division of the old Fifth Circuit into a new Fifth Circuit, composed of Louisiana, Mississippi, Texas and the Canal Zone, and a new Eleventh Circuit, composed of Alabama, Florida, and Georgia. This circuit composition is codified at 28 U.S.C. Section 41. For additional background, see: *Circuit Realignment: Hearings on S. 2988, S. 2989, and S. 2990 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93rd Cong., 2d Sess. (1974); *Circuit Realignment: Hearings on S. 729 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975); *A Proposal to Divide the Fifth Circuit: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess., Ser. No. 25 (1978); *Federal Court Organization and Fifth Circuit Division: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 2d Sess., Ser. No. 64 (1980).

[6] In the 94th Congress, proposals to divide the Fifth Circuit and the Ninth Circuit were separated into two bills by the Senate Judiciary Committee and reported individually: Fifth Circuit: S. 2752 (an original bill), S. Rep. 513, 94th Cong., 1st Sess. (1975); Ninth Circuit: S. 729, S. Rep. 1227, 94th Cong., 2d Sess. (1976). By the time of passage of the "Fifth Circuit Court of Appeals Reorganization Act of 1980," Act of October 14, 1980, 94 Stat. 1994, there appeared to be no organized opposition to the bill which was unanimously endorsed by all Fifth Circuit judges in regular active service. H.R. Rep. No. 1390, 96th Cong., 2d Sess. 2-5 (1980). Another attempt was made in the 98th Congress in the form of S. 1156. That legislation proposed a new Ninth Circuit composed of Arizona, California, Nevada, Guam and Hawaii and a new Twelfth Circuit composed of Alaska, Idaho, Montana, Oregon and Washington. S. 1156, 98th Cong., 1st Sess. reprinted at 7 in *Oversight on the Federal Court of Appeals and U.S. Claims Court Workload and a Hearing on S. 386, S. 677, and S. 1156 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess., Ser. No. J-98-97 (1984).

[7] *Oversight on the Federal Court of Appeals and U.S. Claims Court Workload and a Hearing on S. 386, S. 677, and S. 1156 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess., Ser. No. J-98-97 (1984), p. 20-21.

[8] *Id.*, at 17.

[9] *Annual Report of the Director of the Administrative Office of the United States Courts*, 1988, at 156.

[10] Remarks of the Honorable J. Harvie Wilkinson III, Symposium: Federal Courts: The Next 100 Years, Commentaries I, 38 S. Carolina L. Rev. 439 (1987).

[11] *The United States Court of Appeals: Re-examining Structure and Process After a Century of Growth*, Report of the American Bar Association Standing Committee on Federal Judicial Improvements, March 1989, at 6.

[12] Ninth Circuit Judicial Council, Survey of District Court Judges and Attorneys Regarding the U.S. Court of Appeals for the Ninth Circuit 19-20 (Office of the Circuit Executive 1987).

[13] Wasby, Stephen L., Inconsistency in the United States Courts of Appeals: Dimensions and Mechanisms for Resolution, 32 Vand. L. Rev. 1343 (1979).

[14] See Note 12, *Supra* at 26.

[15] Suarez, Aquiles F., No more Justice Delayed: Time to Divide the Ninth Circuit Court of Appeals. The Heritage Foundation (Backgrounder No. 711, 1989).

[16] Transcript of Proceedings of the Federal Court Study Committee, March 1989, at 20.

[17] See Note 6, *Supra* at 90.

[18] See Note 6, *Supra* at 18.

[19] See Note 6, *Supra* at 96.

Splitting the Ninth Circuit — No answer to caseload growth

By Alfred T. Goodwin
Chief Judge
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for the Ninth Circuit

S. 948 would carve out of the present Ninth Circuit a new Twelfth Circuit of Washington, Montana, Oregon, Idaho and Alaska, most of whose senators favor the division, and Hawaii, Guam and the Northern Mariana Islands, whose senators and local bar associations were not consulted by the sponsors. The proposed new Ninth Circuit would include California, Nevada and Arizona. The Twelfth Circuit would have nine active circuit judges. The Ninth Circuit would retain 19 active circuit judges.

Reasonable growth projections for California alone indicate that in a short time the new Ninth Circuit would need 25 or more judges. The proposed bill may solve a perceived problem in the Pacific Northwest but does little to deal with the caseload problems of federal courts generally, and of the West Coast specifically.

S. 948 puts forward once again the argument that the Ninth Circuit is too large to function efficiently, and then assumes that the brunt of the inefficiency is borne by the northwestern states. Similar proposals have been made and rejected by Congress on a number of occasions, beginning as early as 1940. The state bars of five states and one territory have gone on record against the bill. The proposal should be rejected again.

The last such bill was presented to the 98th Congress in 1983, when the Ninth Circuit had 23 appellate judges. It did not reach the Senate floor. Ten years earlier, when the Ninth Circuit had 13 appellate judges, the Hruska Commission recommended division of the Fifth and Ninth Circuits. Bills were introduced and hearings were held. An excellent book by Barrows and Walker ("A Court Divided"), Yale University Press, recounts the history of the legislation concerning the Fifth Circuit.

In 1978, with the White House and Congress in a rare condition of partisan harmony, the pressure to double the size of the federal judiciary could no longer be contained. The Fifth Circuit Court of Appeals soon grew to 25 judges and the Ninth to 23.

Congress provided in Section 6 of the Omnibus Judgeship Act of 1978 that any Court of Appeals having more than 15 active judges could divide itself into administrative units and perform its en banc function with less than all of its judges.

Congress invited the large circuits to report to Congress on their progress and to recommend additional legislation that might be necessary to provide for the effective administration of their courts. Two paths were followed.

The judges of the Fifth Circuit Court of Appeals unanimously asked Congress to divide their circuit. The next Congress acquiesced. The Ninth Circuit accepted the invitation of Congress to experiment and embarked upon a program of administrative innovations to keep the circuit together while addressing the problems of growth. The court sits en banc with eleven judges, and divides many administrative functions among three regional "chief" judges.

The Ninth Circuit submitted its first report to Congress in 1982, describing in detail the changes undertaken to manage a large appellate court. The 1984 report noted substantial progress but acknowledged the challenges still to be met. The 1986 report answered the question posed by Section 6 — stating emphatically that a large circuit can perform well and that no further legislation was necessary. The Ninth Circuit's fourth report to Congress in 1989 summarized the experience of the Ninth Circuit as follows:

> The court reorganized itself into three administrative units, and decentralized various administrative functions to expedite local supporting services.
>
> The court adopted a rule creating a limited en banc court of 11 judges (the chief judge and 10 circuit judges drawn by lot for each case) to resolve panel conflicts and employed staff attorneys to look for potential intracircuit conflicts. The en banc proceedings are as effective as those of other circuits in minimizing conflicts.
>
> The court reorganized the circuit judicial council, reducing its size from 23 to 9 — four circuit judges, four district judges, and the chief judge of the circuit — creating a unique partnership among appellate and trial judges devoted to improving the administration of the courts of the circuit.

The report concluded:

> In 1989, the court can report that the innovations of the past decade provide a solid foundation for the continued growth of the Ninth Circuit. The circuit continues to refine the concepts it has developed over the past ten years with the hope that they may assist other circuits in confronting the challenges of a burgeoning federal caseload in the twenty-first century.

In 1974 only two circuits had 13 or more judges. Many court administration students firmly believed then that a court of more than nine judges could not manage its caseload. That is no longer an accurate perception. When the additiona judgeships the Judicial Conference requested in 1988 are approved by Congress, five circuits will have 15 or more appellate judges.

Since the 1970s there has been a revolution in communications, changing the ways that judges communicate with each other and with members of the bar. These innovations include facsimile (FAX) transmission, electronic mail, and computerized data bases that produce fo immediate reading any published opinio in the country. Courts have continued t discover ways of dealing with caseloads that far exceed numbers contemplated 2 years ago. There may be a limit to the number of cases a single circuit can process, but the judges of the Ninth Circuit Court of Appeals are unanimou in their view that we have not yet reach the caseload limit of a court of appeals sitting in three-judge panels.

Creation of another circuit can only add to the number of conflicts the Supreme Court must review. The limited en banc procedure of the Ninth Circuit has a proven success record in not adding to the Supreme Court load.

Inter-circuit conflicts build up pressure to create a fourth-tier court between the existing circuits and the Supreme Court. The bar, understandably, has opposed the idea of three levels of appeal. Clients would pay in both time and money.

In sum, the circumstances which led the Appellate Judges Conference of the American Bar Association to recommend circuit realignment in 1974 no longer exist. There have been many intervening, significant changes. The Ninth Circuit has had the benefit of nearly 12 years of experimentation with a rapidly growing court and caseload. The principal criticism of the large court began with disapproval of the results in specific cases, and when that line of argument proved to be embarrassing, there began a scramble for arguments couched in judicial administration terms to support the proposed bill.

Most judges would agree with Professor Charles Alan Wright who wrote in 1964 that the ideal number of judges for a court of appeals is three, without carrying the logic to the point that the United States should have 35 or 40 or more appellate circuits as federal caseloads grow.

In calendar year 1988, the Court of Appeals for the Ninth Circuit terminated 6170 appeals, 17.7 percent more than the previous year. The court was able to meet its workload despite three vacancies that represented a combined loss of more than 50 months of judicial time. Despite a 20 percent increase in billings during the same period, the court calendar was current. Once a case is fully briefed by counsel, it is usually scheduled for the next argument calendar.

Splitting the Ninth Circuit, or other circuits, would not address the real problem facing the Federal Courts of Appeals. The problem is not structure, but workload. Creating more regional circuits would not diminish the work, but merely divide it. The number of cases that must be heard by three-judge panels nationwide would remain the same and continue to grow no matter how many new circuits are formed. California alone will soon need 21 federal appellate judges to handle the appeals from five heavily populated districts. In another 20 years, 30 federal appellate judges will be needed for appeals arising in a single state. These numbers alone do not require the proliferation of new regional circuits.

Creating more circuits would multiply inter-circuit conflicts. Several Supreme Court justices even now consider the creation of a new tier of federal appellate review necessary to resolve inter-circuit conflicts. Other observers suggest the creation of additional specialized federal appellate courts to relieve the Supreme Court. The common law tradition of generalist judges is at risk whenever caseloads pass the breaking point, but breaking up regional circuits is not necessarily the best answer.

Splitting the Ninth Circuit, or other circuits, would not address the real problem facing the Federal Courts of Appeals. The problem is not structure, but workload. Creating more regional circuits would not diminish the work, but merely divide it.

The size of the Ninth Circuit is more an asset than a liability. The Court of Appeals is strengthened and enriched by the variety of backgrounds of its circuit judges, drawn from various parts of the circuit. Immediately following the passage of Section 6, the court experimented with a program in which each judge sat and heard cases only in the administrative division of the judge's residence. After six months, the judges overwhelmingly voted to discontinue the experiment. The loss of intellectual interchange with a larger group of judges drawn from a greater variety of backgrounds outweighed any perceived benefits. Intracircuit conflicts were beginning to appear and would have ripened into serious regional conflicts. Division of the circuit would make permanent a parochialism that experience has led the judges to reject. The judges believe that national statutes and federal regulations should be uniformly applied nationwide and that federal courts are not the place for the injection of local politics, prejudices, opinions or preferences.

Because of its size, the Ninth Circuit has a large pool of district judges available for assignment to districts that develop a temporary but acute need for help. For example, several district judges have been assigned temporarily to Alaska because Alaska has had a judicial vacancy for many months and one of its two active judges was committed to a year-long criminal trial. Judges throughout the circuit assisted the district of Hawaii when two of the three authorized judgeships remained vacant for a number of years. During that same period, visiting judges disposed of more than 1,000 asbestos damage cases. In recent years, the greatest need for help has arisen in districts that would be separated from the Ninth to create the Twelfth. In the last year, 42 individual assignments have been made from districts in the proposed Ninth to districts in the proposed Twelfth.

Preservation of a single circuit with a single court of appeals has resulted in the creation of a consistent and predictable body of federal law throughout the western states. Trade with the Far East enjoys a uniform body of federal law in all of the Pacific ports. Those who argue that the size of the Ninth Circuit makes it difficult for lawyers to know and advise their clients on the law of the circuit forget that division would require them to know the law of all the circuits in which their clients do business. Splitting the Ninth Circuit is an old idea whose time has not yet arrived.

REPORT

Justice on Appeal; A Proposal

by Noel V. Lateef

Politics and justice mix about as well as oil and water. Take the case of the most recent attempt to divide the United States Court of Appeals for the Ninth Circuit.

Servicing the western United States, the Ninth Circuit encompasses nine states, Guam and the Northern Mariana Islands — a land area of 1,600,000 square miles and the home of over 40 million people. A recent bill introduced by Senator Slade Gorton (R-Washington) would transfer Washington, Oregon, Alaska, Idaho, Montana, Hawaii, Guam and the Northern Mariana Islands to a new circuit, leaving California, Nevada and Arizona in what would remain of the Ninth Circuit. The Senator's rationale for this bill: "Northwestern states are simply dominated by California judges and by California attitudes."[1]

While it is alleged that the creation of yet another federal circuit will give certain interests in the Northwest a fairer hearing,[2] such a division endangers the fabric of federal law in a region — the Pacific Rim — where uniformity of law is increasingly critical to American economic competitiveness. Indeed, ample evidence suggests that, rather than divide the circuits, the more appropriate course would be to consolidate them. Fewer circuits would ease the strain on the Supreme Court for maintaining the fabric of national law by reducing the number of inter-circuit conflicts. By disposing of a manageable number of conflicts, the Supreme Court, which currently hears less than five percent of appeals before it, would effectively "reassert" its primacy over federal appellate courts which, statistically, have become courts of last resort.[3]

II. The Crisis

Alexander Bickel, the Constitutional scholar, argued that a decision that does not attempt to gain reasoned acceptance for the result does not make law "in the sense which the term 'law' must have in a democratic society."[4] Through its power of review of judgments in cases brought before it by way of certiorari and appeal the Supreme Court rationalizes, in a Bickelian sense, the entire corpus of federal law. When the Court is so beleaguered by an oppressive case load that it cannot maintain the upkeep of a harmonious body of national law, justice under a democratic system of government is undermined. This is the overarching danger posed by the crisis in the federal courts' burgeoning case loads — a danger overlooked by advocates of the Gorton legislation. Dividing the Ninth Circuit only engenders more conflicts of law between federal circuits at a time when the Supreme Court is incapable of disposing of such conflicts.

In the past, although the number of cases brought to the Supreme Court multiplied, the number disposed of on the merits after argument remained fairly constant, preserving the traditionally high quality of the Court's opinions. By their own reckoning, the Justices' workload, for a number of years, has been straining the limits of human endurance.[5] The Court's case load, how-

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Noel V. Lateef clerked for Judge James R. Browning of the U.S. Court of Appeals for the Ninth Circuit in 1982/83. Many of the innovations described herein were instituted under Judge Browning's leadership of the Ninth Circuit during his tenure as Chief Judge. The views expressed in this article are solely the author's.

ever, is only the tip of the iceberg. If federal appellate cases continue to grow at the same annual rate as they have grown in recent years, by the year 2010 we can expect to have well over one million federal appellate cases annually, requiring one thousand new volumes of the Federal Reporter each year to report decisions.[6]

Prior to the passage of the 1925 Judiciary Act, vesting broad discretion in the Supreme Court to choose the cases it decides on the merits, where there was a square conflict, the Court granted certiorari as of course, and irrespective of the importance of the question of law involved. In recent years it has become clear that the existence of a conflict, without more, is not always sufficient to convince the Court that certiorari should be granted. Increasingly, denials of certiorari indicate that even a square conflict on an important issue may not be enough. In *Bailey v. Weinberger,*[7] Justices White, Douglas, and Stewart, in dissenting from a denial of certiorari, declared that the holding below as to the unreviewability of a refusal by the Department of Health, Education and Welfare to review a denial of Social Security benefits was "squarely in conflict with the holdings of three other Circuits." Their opinion continued:

> "It is a prime function of this Court's certiorari jurisdiction to resolve precisely the kind of conflict here presented. This Court's Rule 19(1)(b). Perhaps the state of our docket will not permit us to resolve all disagreements between courts of appeals, or between federal and state courts, and perhaps we must tolerate the fact that in some instances enforcement of federal law in one area of the country differs from its enforcement in another. These situations, it is hoped, will be few and far between."[8]

The failure to resolve conflicts is antithetical to the Court's own motto: "Equal Justice Under Law." A frequent critic of the Court's failure to resolve conflicts, Justice White could dissent from the denial of certiorari in four cases announced on the same day, citing the inequities posed by the failure to resolve conflicts. *Masri v. United States,*[9] (conflict should be resolved "where a defendant's rights would be notably different depending upon the Circuit in which he is tried"); *Ransom v. United States,*[10] (conflict should be resolved since the "national criminal code should not be differently interpreted in different courts; some individuals should not be punished for conduct for which others would go free"); *Lay v. Williams,*[11] (conflict should be resolved where issue "is clearly an important one which significantly affects a great number of persons . . . [and] we have previously granted certiorari to decide [similar issue]"); *Dupuy v. Dupuy,*[12] (conflict over standard for applying SEC regulation should be resolved because "early clarification of the ground rules" would permit business to be transacted "more freely and efficiently" and would permit "complex and expensive" securities litigation to be avoided). Lower courts, consequently, are faced with more litigants, opening the Court to criticism that it has caused its own overburdened case load."[13]

Roughly half the cases to which the Supreme Court grants certiorari each term involve conflicts between circuits.[14] Chief Justice William Rehnquist remarked: "While the number of unresolved conflicts between courts of appeals which were not resolved by this Court is not numerically large, it is significant and, I think everyone would agree that it is bound to increase."[15] Creating more circuits would contribute to the development of more conflicts and to the disjointedness of federal law.

III. Consolidation of the Circuits

In his provocative 1906 address to the American Bar Association, Roscoe Pound roundly criticized our system of courts as archaic. Among the symptoms of backwardness cited were the multiplicity of courts and the attendant inefficiencies in the deployment of judicial manpower. Pound advocated collapsing the federal and state courts into a monolithic structure along the lines of the English Judicature Act of 1873.[16] Because the American judicial system emulated the British system "at a time when English judicial organization was at its worst,"[17] Pound viewed the extant structure of complex concurrency as little more than an accident of history. This view, however, does not suffice to explain the structure's persistence. Reform of that structure can and should be more sanguine to the benefits of jurisdictional redundancy.[18] Consolidation of the circuits into six or so mega-circuits would further the value uniformity, reducing variation in the interpretation and application of law, while preserving the advantages of concurrency.

1. Uniformity

The principle of uniformity undergirds many features of the federal court system. Whatever else one may say about adjudication in federal courts, uniform procedure is applied. The same procedural rules control from Guam to Maine. Yet, substantively, federal law has not kept apace with Congressional aspirations for a uniform body of national law.

Much of national lestislation establishing important social programs was not intended to have a progressive effect depending on who has access to what forum. Congress intended that citizens be treated equally with regard, for example, to their rights under the Social Securities laws, the Truth in Lending Act, the Federal Employers' Liability Act and the Occupational Safety and Health Act. Consumers should not be exposed to defective products dumped in some parts of the country in violation of the Consumer Products Safety Act, and no miner should have to work in mines operated in contravention to the Mine Safety Act.

Indeed, the purpose of some acts of Congress cannot be fulfilled without their uniform application. This is true, for example, of legislation dealing with the environment, including the National Environmental Policy Act, the Clean Air Act and the Water Pollution Control Act; air and water do not readily submit to human notions of jurisdiction.

The unique national jurisdiction conferred by Congress in the Federal Courts Improvement Act of 1982 upon the newly created United States Court of Appeals for the Federal Circuit strives for uniformity in federal law. The new court is the product of a merger of the United States Court of Customs and Patent Appeals and the United States Court of Claims. The jurisdictional scope of the new court is extended nationwide in the fields of patents and claims against the government. The report of the Senate Committee on the judiciary makes explicit Congress' expectation that the new court will "improve the administration of patent law by centralizing appeals in patent cases."[19] The broad powers in terms of geographic jurisdiction are consistent with the present proposal.

By reducing the net number of conflicts between circuits, consolidation will eliminate years of repetitive litigation and uncertainty as to the state of federal law. Consolidation, in short, will contribute to stability in the law, enabling the courts and the legal profession to serve society effectively. Uniformity of law and jurisdictional concurrency, however, are not necessarily mutually exclusive.

2. Concurrency

The value of concurrency underlies appellate review. Repetition serves several purposes. Judge Clifford Wallace of the Ninth Circuit observes: "On difficult issues where reasonable minds may differ, the Supreme Court has the benefit of observing a 'field experiment' in different ways a generality may be applied. In analyzing the different approaches, the Court is better equipped to refine the general principle."[20] Of course, such a "field experiment" presupposes the Court will have the appellate capacity to select the most appealing, i.e., suasive, reasoning issuing from the courts of appeals.

Ideally, concurrency produces a creative dialogue between federal courts. Without an effective moderator, however, this exchange can degenerate into twelve or more monologues. Given caseload burdens and time constraints, it is not always possible to take stock of the positions adopted by a dozen circuits on a question of law. Hence, fewer circuits would improve communications among them and heighten inter-circuit deference. The present proposal, therefore, in fact enhances the benefits of concurrency.

The horizontal polarization in the federal judicial structure currently impedes communications at many levels. The Supreme Court is no longer fully vertically integrated into that structure. Yet, without such integration, federal law lacks coherence, stability and finality — values underlying the judicial article of the Constitution. Alexander Hamilton might as well have been speaking, with some hyperbole, to our thirteen-circuit paradigm when he said: "The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen independent courts of final jurisdiction over the same causes arising upon the same laws is a hydra in government from which nothing but contradiction and confusion can proceed."[21]

IV. The Administration of Reform; The Case of the Ninth Circuit

A critical stumbling block to consolidation of the circuits is inadequate organizational management. Seemingly insurmountable administrative hurdles contributed to the division of the Fifth Circuit. The Ninth Circuit, on the other hand, clearly demonstrates that, with well-conceived reforms, a mega-circuit can function effectively both administratively and in performance of its judicial functions.

Divided over the recommendation of the Commission on Revision of the Federal Court Appellate System that the Ninth Circuit be split, Congress increased the number of Ninth Circuit appellate judges to 23 and provided in the Omnibus Judgeship Act of 1978 that any court of appeals with more than 15 active judges could constitute itself into administrative units and could perform its *en banc* function by any number of judges the court by rule prescribed. These provisions reflected two key Congressional reservations underpinned by the assumption a circuit could not operate effectively if its court of appeals exceeded 15 judges — the number of judges then on the Fifth Circuit Court of Appeals.

The first reservation had to do with administration. A circuit with more than 15 appellate judges would presumably be large and geography was thought to complicate administration. Moreover, Section 332 of the Judicial Code vests responsibility for administration of the federal judicial system in the judicial council of each circuit, and each council then consisted of all the appellate judges of the particular circuit. A council of more than 15 was considered too unwieldy to exercise administrative authority effectively.

The second reservation related to the exercise of the appellate function. There was apprehension that a court of appeals of 15 or more judges could not maintain a consistent body of law for the circuit. Courts of appeals sit in panels of three. The greater the number of judges on the court, the greater the number of three-judge panels, and the greater the likelihood of conflicting decisions among those panels. It was thought such conflicts could be resolved only by the court sitting as a whole, and that a court of more than 15 judges sitting *en banc* could not function effectively.

The administrative units and *en banc* provisions of the Omnibus Judgeship Act of 1978 were intended to afford the larger circuits, specifically the Fifth and the Ninth, an opportunity to stave off dismemberment. The judges of the Fifth Circuit, however, were unable to agree upon the creation of administrative units within the circuit. They were also unable to agree upon a rule limiting the size of the *en banc* court. Twenty-five Fifth Circuit judges participated in its first *en banc* session. It required four and one half hours for the 25 judges to express their views on a single case. Not surprisingly, the judges concluded that an *en banc* court of that size was unworkable. In the summer of 1980, they petitioned Congress to divide the circuit.

In contrast, the Ninth Circuit fully embraced the opportunity extended by Congress. By 1980, the circuit judges had agreed upon a rule providing for a limited *en banc* court. Within 90 days after the confirmation of its sixteenth circuit judge, the Ninth Circuit adopted a plan creating administrative units within the circuit.

1. Limited 'en banc'

By Circuit Rule 35-3, the Ninth Circuit has adopted a limited *en banc* procedure that requires the participation of 11 judges out of the court's 28 active judges. The Chief Judge and 10 judges selected by lot sit on each *en banc* panel; cases continue to be taken *en banc* on the vote of a majority of all active judges out of the court. In testimony before the Senate Judiciary Committee, Judge Clifford Wallace commented on the limited *en banc* procedure as follows:

> Having sat on seven of these limited *en banc* cases, my impressions are positive. The critical question is whether each judge of the court of appeals will conclude that he or she need not vote on every *en banc* case. From my own observations, I sense a different climate when the selected judges represent the court. *En bancs* under the traditional system often centered around attempts by the author of the panel opinion to justify his or her position, in the face of repeated attacks by the panel dissenter. Now, only by chance is a member of the panel on the *en banc* court, and, so far, I have not witnessed any great defensiveness.[22]

To date, the *en banc* procedure has been effectively employed, producing dispositions more promptly with less use of judge time. The average time from submission to decision by the limited *en banc* panels has been considerably shorter than under the old procedure. Although *en banc* panel decisions may be reheard by the entire court, no judge has requested reconsideration by the full court.

Former Chief Justice Warren Burger urged the federal appellate courts to go one step further and adopt rules to require *en banc* hearings of those cases in which a panel of the court proposes to initiate or continue a conflict among the circuits. If the rule were limited to those instances in which the Ninth Circuit initiated the conflict by knowingly disagreeing with a holding of another circuit, the number of *en banc* cases would probably be tolerable. In the present thirteen-circuit paradigm, however, a mandatory *en banc* for every continuation of intracircuit conflict could become very burdensome given the multiple situations in which conflicts are continued.[23] Nonetheless, the limited *en banc* procedure represents a practical means for blending the law in large batches.

2. Administrative Units

For administrative purposes, the Ninth Circuit has been divided into three administrative units, each with an administrative judge. The chief judge, the three administrative judges, and five active judges drawn by lot from among those willing to be considered constitute an Executive Committee authorized to act for the court between court meetings, in emergencies, and upon matters not sufficiently important to justify consideration by the whole court. The key function of the Executive Committee, however, is to review proposals regarding the operation of the court and to make recommendations on such proposals to the full court.

It is envisaged that circuits consolidated into one court under the present proposal would for the most part retain their administrative identity as units of the consolidated circuit. The chief judge of each merging circuit would retain most of his administrative duties in his capacity as coordinating judge. The senior chief judge in the consolidated circuits would assume the post of chief judge of the enlarged circuit.

As in the current administrative structure of the circuits, the judicial council can be expected to play an active role in focusing critical concerns within the consolidated circuit. The council would have equal representation from the administrative units. In this regard, the Ninth Circuit has created a Conference of Chief District Judges, a Conference of Chief Bankruptcy Judges, parallel Liaison Committees of the Clerks of those courts, and a Conference of Magistrates to expedite coordination of efforts in addressing common goals and problems. The Court Executive Committee, which includes the three coordinating judges, has expanded its functions to minimize the administrative burdens and improve coordination of functions in the three units.

3. The Technology Salient

Consolidation of the circuits would have been implausible in the past. However, the many advances in communications and transport have rendered circuit riding over large areas less arduous and costly. Computers and office technology have made it possible to link up court houses scattered throughout the circuit. Indeed, on an average day, over one thousand pieces of electronic mail are transmitted within the Ninth Circuit.[24]

Computer programs have been developed by the Ninth Circuit Staff Attorneys Office to insure that cases of comparable age and priority are calendared in each unit at approximately the same time. Computerized case assignment reports are prepared monthly for each assigned judge, each presiding judge and for the Chief Judge. Internal guidelines direct expedition of dispositions in criminal cases, require presiding judges to contact assigned judges if delays develop, and permit two members of a panel to file a disposition if the third judge's position with regard to the disposition or separate opinion is substantially delayed. These and other administrative practices were originally part of the Ninth Circuit's Innovations Project. The Project has enabled active circuit judges to increase their case participation by 50 percent and has resulted in a decrease in the median waiting time from the filing of the notice of appeal to final disposition. Furthermore, this decrease has been accompanied by a reduction of more than half in reliance on visiting judges.

The future will bring many more innovations. Computers will perform increasingly protean functions. The Ninth Circuit's AIMS (Appellate Information Management-System) already (1) tracks motions, (2) lists scheduled actions, (3) simulates and projects case flow, (4) produces an electronic docket sheet, (5) serves as a case management tool, and (6) provides statistical data. In the future, AIMS will prepare calendars.

4. Deployment of Human Resources

As Pound observed in 1906, jurisdiction is a drain on judicial power when "business may be congested in one court while judges in another are idle."[25] A mega-circuit affords flexibility in this regard. When, in the mid-seventies, the Southern District of California and the District of Arizona were overwhelmed by their criminal caseloads, and were unable to try civil cases, district judges were brought from the Northwest to meet the need. The situation then reversed itself. In the early eighties, the district with acute calendar congestion was the Western District of Washington, to which trial judges from the Southern District of California and the District of Arizona were assigned.

A large circuit also balances out fluctuations at the appellate level and contributes to the efficient use of appellate judges. The number of circuit judges appointed from different parts of the Ninth Circuit is rarely congruent with the number of appeals originating in those areas. Appeals from all parts of the circuit are heard after the same lapse of time because the panels that hear them are drawn from a common pool of judges for all parts of the circuit. If the circuit were divided, a mismatching of judicial resources and appellate caseload would inevitably arise. The problem would be particularly serious if, as in previous proposals, California were divided between circuits. This single state is the provenance of nearly 60 percent of all appeals in the Ninth Circuit.

Appellate judges currently sit approximately an equal number of times in all units of the Ninth Circuit. This makes possible a stronger, more vigorous, and less parochial appellate court. The court of appeals is strengthened and enriched by the variety of its circuit judges drawn from all parts of the circuit. For a period, the Ninth Circuit experimented with a program in which the judges sat and heard cases only in the area of their residence. After six months, the judges unanimously agreed that the loss of intellectual interchange far outweighed the savings in travel. The view that a more parochial court composed of local judges might better serve the interests, for example, of the northwestern states in such matters as Indian and fishing rights and federal timber distribution is not sound, either for the northwestern states or for the country. A division of the circuit would make permanent a parochialism that experience led Ninth Circuit judges to reject.

Conclusion

The American window on the Pacific basin benefits from unified federal law. To break up the Ninth Circuit invites comparison to the European model where, as a *Financial Times* columnist recently observed: "Whatever the success, so far, of the 1992 programme in breaking down barriers to trade, it remains clear that an average European company cannot operate in the single legal or fiscal environment that its Japanese or even U.S. competitors enjoy in their home bases."[26] It is vital that such an environment be preserved in the western United States. And perhaps even more compelling, by eschewing parochialism, the quality of justice will be preserved.

ENDNOTES

1. Tegstedt, *Northwest Favors Splitting 'California' Circuit*, Legal Times; Law and Lobbying in the Nation's Capital, June 12, 1989 at 2.

2. *Id.* Development and timber interests are cited.

3. One commentator notes:

"The appellate judiciary is becoming enervated by its massive caseload and the bureaucratization of its own work. As a consequence, the legitimacy of appellate review as a legal institution is in question."

Hazard, Book Review, 96 Harv.L.Rev. 758, 761 (1983) (reviewing R. Stern, Appellate Practice (1981)). *See generally* Griswold, *Rationing Justice – The Supreme Court's Caseload and What the Court Does Not Do* 60 Cornell L. Rev. 335 (1975).

4. Bickel & Wellington, *Legislative Purpose and Judicial Process: The Lincoln Mills Case*, 71 Harv.L.Rev. 5 (1957)

5. Greenhouse, *Justices Speaking Out on Reducing Their Caseloads*, N.Y. Times Sept. 14, 1982 at 10; *High Court's Caseload Too Heavy*, 68 A.B.A.J. 1201 (Oct. 1982); address by Chief Justice Warren E. Burger, A.B.A. Mid-year Meeting, Houston (Feb. 6, 1983).

6. Barton, *Behind the Legal Explosion*, 27 Stanford L.Rev. 567 (1975).

7. 419 U.S. 953 (1974).

8. *Id.* at 953-954 Speaking for the Court in *Martin v. Hunter's Lessee*, 1 Wheat 304 (1816), Justice Story emphasized the "importance, and even necessity of uniformity of decisions throughout the whole United States upon all subjects within the purview of the Constitution." The rationale was simple: "Judges of equal learning and integrity in different states might differently interpret the statute or a treaty of the United States, or even the Constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different states, and might, perhaps, never receive the same construction, obligation or efficacy in any two states. The possible mischief that might attend such a state of things would be truly deplorable."

It has been observed that the function of the Supreme Court is not to correct lower court errors, but to "secure harmony of decision and the appropriate settlement of questions of general importance." Address of Chief Justice Hughes at the American Law Institute Meeting, *quoted in* 20 A.B.A.J. 341 (1934).

9. 434 U.S. 907 (1977).

10. 434 U.S. 908 (1977).

11. 434 U.S. 910 (1977).

12. 434 U.S. 911 (1977).

13. *Id.*

14. *See Structure and Internal Procedures: Recommendations for Change*, Commission on Revision of the Federal Court Appellate System 67 F.R.D. 195, 239 (1975).

15. Letter dated June 10, 1974 to A. Leo Levin, reprinted in 67 F.R.D. 408 (1975).

16. Address by Roscoe Pound, A.B.A. Annual Convention (1906)

17. *Id.*

18. *See, e.g.* Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology and Innovation*, 22 William & Mary L. Rev. 639 (1981).

19. The Federal Courts Improvement Act of 1982, creating the United States Claims Court, was intended "to resolve some of the myriad structural, administrative and procedural problems that have impaired the ability of our federal courts to deal with the vast range of controversies among our citizens and to respond promptly and meaningfully to their demands for justice." S. Rep. No. 275, 97th Cong., 1st Sess. 1 (1981).

20. Address by Judge J. Clifford Wallace, University of California Law School at Berkeley (Dec. 2, 1983).

21. Hamilton, *The Federalist* No. 80. Professor Geoffrey Hazard states with regard to an increase in the number of courts of appeals, "what were once authoritative appellate tribunals, subject to occasional

review by the Supreme Court would have been converted into a judicial Tower of Babel. The proliferation of utterances could divest any one of these courts of significant authority." *After the Trial Court – The Realities of Appellate Review in The Courts, The Public and the Law Explosion* 60, 61 (H. Jones, ed. 1965).

22. Wallace, *supra*, note 20.

23. These are: (1) where the court unintentionally creates a conflict by issuing an opinion simultaneously with another circuit, or sufficiently close in time that neither circuit is aware of the other circuit's case; (2) where the court creates a conflict but is unaware of the earlier opinion of the other circuit; (3) where the court continues a conflict among the circuits by being forced to choose between conflicting opinions of two circuits; and (4) where the court continues a conflict by adhering to its previous position after another circuit has disagreed with that position.

24. For a discussion of how technology has enabled the Ninth Circuit to get a handle on its caseload see Lateef, *Keeping Up With Justice: Automation and the New Activism*, 67 Judicature 213 (1983).

25. *See* Pound, *supra*, note 16.

26. Buchan, *Obstacles to the European Company*, Financial Times, July 5, 1989 at 5.

Fourth Biennial Report to Congress On the Implementation of Section 6 of the Omnibus Judgeship Act of 1978

1866

Submitted by
The Judicial Council
and
The United States Court of Appeals
For the Ninth Circuit

July 1989

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Fourth Biennial Report to Congress On the Implementation of Section 6 of the Omnibus Judgeship Act of 1978 And Other Measures to Improve The Administration of Justice in the Ninth Circuit

Introduction and Summary

Introduction

Nearly 20 years ago, the Hruska Commission recommended to Congress the division of the Fifth and Ninth Circuits. The Commission predicted that circuits of the size of the Fifth and Ninth (then 15 and 13 judges, respectively) could not function effectively.

Congress disagreed with the Commission and declined to divide the two circuits. Instead, Congress enacted section 6 of the Omnibus Judgeship Act of 1978, Public Law 95-486, supplemented by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Public Law 96-458, and invited any court of appeals with more than 15 active judges to participate in an experiment to determine whether a large circuit could operate efficiently. Section 6 provided large circuits with the authority to implement innovative procedures designed to foster effective administration and to maintain a consistent body of law.

The Ninth Circuit accepted Congress's invitation to innovate, and has created the efficient large circuit envisioned by section 6:

- The court reorganized itself into three administrative units, and decentralized various administrative functions to expedite local administrative matters.

- The court adopted a rule creating a limited *en banc* court of 11 judges (the chief judge and 10 circuit judges drawn by lot for each case) to resolve panel conflicts and created numerous safeguards to prevent intracircuit conflicts from arising.

- The court reorganized the circuit judicial council, reducing its size from 23 to 9 -- 4 circuit judges, 4 district judges, and the chief judge of the circuit -- creating a unique partnership among appellate and trial judges devoted to improving the administration of the courts of the circuit.

- The court increased its judicial workload and adopted a set of innovations -- including a submission-without-oral-argument track for simpler cases and a prebriefing conference program to narrow issues, shorten briefs, and encourage settlement -- that has boosted productivity and eliminated a large backlog of cases awaiting submission. The court is current. Appeals are calendared for hearing as the briefs have been filed.

These innovations inspired by section 6 are no longer in an experimental phase; they now provide a solid foundation for new programs designed to further the efficiency of the Ninth Circuit. The Ninth Circuit experience now provides a model for other circuits, large and small, as they face the challenges posed by the proliferation of litigation in the federal courts.

This document, our fourth report to Congress, describes developments during the three years since our last report. In short, the Ninth Circuit is productive and effective. The experience of the past three years confirms that a court of appeals of 28 active judges can function effectively in its adjudicative and administrative capacities. The judges have maintained consistency in the law as well as the spirit of trust and confidence essential to judicial deliberations. Terminations continue to increase at an unprecedented rate, as do filings. Pending caseloads are manageable, cases are decided with reasonable promptness, and our service to the bar has improved. In addition, the court is constantly exploring new ways to improve the administration of justice in the circuit.

A brief history of section 6 and summaries of our most recent innovations follow.

Background

Over the last half century there have been various proposals to split the Ninth Circuit. Proponents of each proposal predicted the circuit could no longer function for one or more of several reasons: size, difficulty and delay of travel for judges, potential conflict among the panels, and unwieldy *en bancs*. Congress, however, rejected each proposal in turn.

Congress rejected the proposals because they were based either on faulty premises or they were shortsighted, oftentimes both. In 1940, the proposal to split the circuit would have created a new circuit that did not have enough filings to warrant even a three-judge court. The 1953 and 1964 proposals rested on the premise that a circuit could not operate effectively if it had more than nine circuit judges -- a premise which, if true, would require the creation of 12 new circuits in 1989. (The 1953 proposal was also concerned with the delay necessitated by train travel for the judges.)

In 1972, Congress created the Commission on Revision of the Federal Court Appellate System chaired by Senator Roman L. Hruska (Hruska Commission) to study the existing division of the federal circuits. The Commission eventually recommended the split of the Fifth and the Ninth Circuits based on its assumption that a court of more than 15 judges and an *en banc* panel of more than nine judges was unworkable.

Congress rejected the Hruska Commission's recommendation. It was concerned that the perpetual multiplication of circuits would only create new problems for the judiciary and more work for the Supreme Court as it sought to resolve intercircuit conflicts. Congress recognized, as did the Hruska Commission, that circuit divisions were at best a temporary solution to the problem and that more enduring reforms were necessary to deal with the projected appellate workload in the last quarter of the twentieth century. It was in this spirit that Congress passed section 6.

Section 6 provided the court of appeals with an opportunity to innovate, rather than split, in the face of increasing caseloads and the corresponding increase in judgeships. Congress understood that factors which may have made a large circuit impractical just 20 years earlier might be irrelevant today.

The Ninth Circuit experience proved that Congress was correct; reorganization and modernization can create an efficient and consistent court of appeals regardless of size. Just as plane travel eliminated the delay created by trains, computer technology now makes communications between chambers in San Francisco and Honolulu almost as instantaneous and certainly as reliable as communications between chambers in the same building. Computers also make it possible to monitor a caseload that is fast approaching 7000 filings a year, ensure equal sittings among the judges, and issue notices automatically to delinquent litigants. A limited *en banc* court has been an unqualified success, and reorganization of the court into administrative units has helped keep a growing caseload manageable.

Faced with the success of the court's innovations under section 6, a proposal to split the circuit in 1983 did not make it to the floor of the house. The most recent proposal, S.948, shares the shortcomings of its predecessors. Instead of proposing to split the Ninth Circuit, it is submitted that the court's innovations should be presented as a model for the rest of the judiciary to follow as it confronts the demands of the next decade.

Summary of Report

The Ninth Circuit has gone far beyond the experiment first proposed by section 6. The court's organization into administrative units and its limited *en banc* are now standard operating procedures which provide the foundation for numerous innovations and refinements. A summary of the major innovations of the past three years are listed below:

Court Adjudication

- New procedures in processing substantive motions allowed the court to process 69% more motions in 1988 than in 1986, and eliminated any backlog in the court's motions practice. (p. 18)

- Despite increased case filings, the court's backlog has been kept to a minimum and cases are generally being calendared within 60 days of being fully ready. (p. 17)

- Cases are being terminated at an unprecedented rate despite delays in filling court vacancies. (p. 16)

- The court reduced its use of outside judges to the third lowest visiting judge participation rate in the country. (p. 16)

- The court's issue identification, weighing and calendaring practices are being considered for adoption in other circuits, and in the Supreme Court of the European Community. (p. 14)

- Improved monitoring practices reduced intracircuit conflicts; the court has averaged one *en banc* for every 378 decisions over the past three years, the fourth lowest ratio in the country. (p. 14)

- In 1988, the Supreme Court granted certiorari in 14 Ninth Circuit cases, the lowest certiorari to disposition ratio in the country. (p. 15)

- Several in-depth studies have been completed that provide a constant source for innovations and improvements. (p. 20)

- The prebriefing conference program was revised and achieved a 30% settlement rate in conferenced cases. (p. 13)

- The median time from submission or hearing to disposition is below the national average. (p. 17)

- The court of appeals is working actively with the district courts to solve reporter problems that delay case processing. (p. 20)

Court Administration

- Fully computerized docketing operations increased the court's ability to monitor its caseload. (pp. 19, 31)

- Newly established presumptive briefing schedules and stricter enforcement of briefing deadlines will reduce the delay in presubmission time. (p. 19)

- New case management attorney positions have been created to improve the court's ability to identify cases that raise similar issues and to maintain consistency in the law. (p. 43)

- The court rules committee revised the local rules to include the court's Internal Operating Procedures, offering the bar more assistance in preparing appeals. (p. 38)

- The court established a 24-hour a day, seven-day a week telephone service to handle emergency motions. (p. 44)

- To further improve collegiality between the bar and the bench, the bar instituted several district mini-conferences for federal judges and practitioners to discuss topics relevant to their district. (p. 57)

- The Judicial Council incorporated more observers to obtain a broader perspective on how to improve the courts of the circuit. (p. 49)

- The circuit saved over $2 million in the first year of budget decentralization. (p. 58)

- A computerized appellate docketing system has fully replaced paper dockets. (p. 31)

- Consistency and collegiality are promoted by creating panels on which each active judge sits with every other active judge with equal frequency and each active judge sits on approximately the same number of panels in each administrative unit. (p. 33)

- Bankruptcy Appellate Panels, unique to the Ninth Circuit, have substantially reduced bankruptcy filings to the court of appeals. (p. 66)

- Library services strive to meet the growing demands despite significant staffing shortages. (p. 45)

- The Ninth Circuit Judicial Council realigned its committees to parallel those at the national level to improve effectiveness. (p. 50)

- Service to the bar and to the public improved with the introduction of automated access to recent court opinions. (p. 22)

- The Ninth Circuit's numerous experiments with automated systems, e.g., BANCAP, PACER, NewCIVIL, and NewCRIMINAL, provide models for the rest of the country. (p. 62)

- Communication and coordination on joint efforts between the state and federal bench has improved with the reactivation of State-Federal Judicial Councils in all nine states of the circuit. (p. 65)

- Juror non-utilization rates have declined with the help of innovative programs at the district level. (p. 59)

- The Court of Appeals Executive Committee has been instrumental in relieving the full court of many administrative duties. (p. 35)

- The circuit executive helped create two death penalty resource centers within the circuit. (p. 41)

- A broadly supported and highly successful circuitwide historical society contributes immeasurably to a sense of community through its many publications and displays. (p. 67)

- The judicial council has taken significant steps towards establishment of a Western Justice Center dedicated to the study and improvement of the judicial system. (p. 68)

I

Court of Appeals

A. Adjudication

1. Introduction

The Ninth Circuit has not only met the challenge presented by section 6; its numerous innovations now serve as a model for how a large circuit can operate judiciously and effectively.

During the past three years the Ninth Circuit has made substantial progress on numerous fronts including termination rates, maintaining consistency of the law, collegiality, case management, automation, and service to the bar. In addition, the court's Innovations Project (adopted in 1982) has met the challenge of a constantly increasing caseload. Disposition times have been shortened and the backlog of briefed cases awaiting submission has been kept to a minimum despite a 17% increase in case filings from 1986 to 1988.

The court, however, has not become complacent in light of the success of the past several years. The Ninth Circuit continues to look for new ways to improve its efficiency and productivity as it moves into the 1990s. The current state of the Ninth Circuit is discussed below.

2. The Innovations Project

The Ninth Circuit adopted a set of innovations in 1982 to address its large backlog of briefed cases awaiting calendaring and to meet the demands of its continually increasing caseload. The innovations package proposed to: (1) increase each active judge's case participation; (2) create a new track for submitting less complicated cases without oral argument; and (3) establish a prebriefing conference program to narrow issues, shorten briefs, decrease motions filings, and encourage settlement. Details of the Ninth Circuit's innovations project may be found in an in-depth study by the Federal Judicial Center. J.S. Cecil, *Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project* (Federal Judicial Center 1985).

Over the past six years, the court successfully implemented the Innovations Project. The innovations eliminated the large backlog of cases awaiting calendaring and has helped to keep to a minimum any new backlog that might develop from the flood of new case filings. As a result of the project, case participation rates by judges are up 43%, over 20% of the caseload is submitted on the new screening track, the prebriefing conference attorneys are settling 30% of the cases they review and are narrowing the issues in many more, and the court's internal mechanism for checking consistency of decisions is so effective that the court enjoys one of the lowest *en banc*-to-disposition ratios in the country.

a. Case Participation

At the outset of the Innovations Project, the judges of the court of appeals agreed to increase significantly their individual workloads. At that time, the average case participation rate for each active Ninth Circuit judge was 184 lead or single cases. By court year 1983, each active Ninth Circuit judge participated in an average of 227 lead or single cases. In court year 1985, the average case participation per active circuit judge increased to 243 cases and in court year 1988 the rate was 257 cases. The average case participation rate for court years 1986 to 1988 is 262 -- an increase of 43% since the court adopted the Innovations Project. In addition, active judges on the court participated in an average of

114 procedural terminations in 1988 (22.5% above the national average) and almost 500 substantive motions (see pp. 26-27). With the steady increase in court filings, the court is investigating new ways to increase case participation even further.

b. The Screening Program

It has become a generally accepted appellate precept that not all appeals should be processed identically. Judicial efficiency and fairness to litigants are both served when different types of cases are treated differently. In the Ninth Circuit, as in almost all other circuits, a significant proportion of the caseload (about 15 to 20 percent of Ninth Circuit appeals decided after submission) is decided on an expedited screening track designed to accommodate cases that can be fairly adjudicated without oral argument.

Appeals satisfying specific criteria are selected for submission without argument on the screening track. The criteria, which track the principles governing submission without argument expressed in Federal Rule of Appellate Procedure 34-4, identify simpler appeals where: (1) the result is clear; and (2) the applicable law is established in the Ninth Circuit based on circuit or Supreme Court precedent.

Cases selected for screening treatment are submitted to one of the court's ten standing screening panels, whose membership rotates at the beginning of each year. The case may be decided without argument only if all three judges agree that oral argument would not aid the decisional process. The judges carefully consider the suitability of each case for no-argument treatment. On average, the judges have rejected from that track and have reassigned for oral argument about 14 percent of the cases initially deemed suitable for screening treatment by the court staff. Parties are also given an opportunity to object to submission without argument before a case is submitted to a screening panel.

The screening program has proven an effective means of managing a growing segment of the appellate caseload. In the last three years, over 1,300 cases have been terminated by screening panels. The court has been careful, however, to offer oral argument in those cases that could benefit from it. Indeed, even after cases have been selected for screening, a certain percentage are placed on oral argument calendars to ensure that no backlog of screening cases develops. This practice represents a deliberate choice to provide oral argument to as many litigants as possible.

c. Prebriefing Conference Program

The prebriefing conference is the appellate equivalent of a civil pretrial conference. The appellant or petitioner files a docketing statement setting forth basic information about the case. A conference may then be scheduled between counsel and an experienced court staff attorney specially designated as a conference attorney. The conferences may be in person or by telephone, depending on counsel's proximity to the court. Prebriefing conferences are designed to resolve procedural issues at an early stage, screen cases for jurisdictional defects, narrow the issues on appeal, establish firm briefing schedules, provide shorter and better quality briefs to the court of appeals judges, and explore settlement potential.

Although the court first initiated the program on a limited basis, the program was expanded in 1985 to include all districts within the circuit. The conference attorneys now review over 3500 civil appeal docketing statements and schedule almost 900 conferences each year. (The conference attorneys also check for jurisdictional defects at this early stage.) The conference attorneys focus on the more complex appeals most likely to benefit from the case management goals of the conference program, and on those where settlement appears to be possible.

The conference program was restructured in the fall of 1988 to allow three attorneys to devote their full attention to conferencing cases. The results have been encouraging. The conference attorneys have helped settle nearly 30% of the 327 cases they conferenced in the last eight months. In numerous cases they have helped parties focus their issues on appeal and limit the size of their briefs. The program has generated nearly unanimous praise from members of the bar and from judges on the court. In fact, the Pacific Trust Territories were so impressed with the program that they requested the court to assign them one of the conference attorneys as a special liaison to assist in establishing a similar program in that jurisdiction.

3. Maintaining Consistency

The Ninth Circuit has implemented an elaborate series of mechanisms to maintain consistency within the circuit. In an average month, about 220 cases are submitted on the oral argument track to eight different panels of judges. Inevitably, some of these cases present the same or similar issues. To minimize the potential for inadvertent conflict between panel decisions, counsel are required by local rule to identify in their briefs any pending cases they know present similar issues. In addition, staff attorneys examine the briefs in all cases and classify the issues each presents. This information is entered into a computer database. In generating calendars of cases for submission to panels of the court, the computer helps identify cases presenting the same issue; those cases are then placed before the same panel. The computer also identifies all cases that raise similar issues. Panels are then advised of the status of the other appeals so steps can be taken to avoid possible conflicts.[1] As an added safeguard, the court's internal policies provide that the first panel to get an issue has the right to decide it; all other panels must wait for that decision and follow it. Judges and staff attorneys also review each proposed disposition and notify the appropriate panel if they detect a possible conflict. Panels can then review the matter and make whatever adjustments are necessary to avoid conflict.

4. The Limited *En Banc*

When conflicts arise despite these measures, the limited *en banc* procedure comes into play. The limited *en banc* court -- used only in the Ninth Circuit -- continues to function well. All 28 active judges participate in determining whether a case will be heard *en banc*. Each call for an *en banc* vote leads to a detailed evaluation by all active judges of the development of the law of the circuit in the area. If a majority of the judges vote to hear a case *en banc*, the chief judge, plus ten members of the court chosen at random, serve as the *en banc* court. Neither the court nor the bar has questioned the authority of the limited *en banc*; in fact there have been very few requests for a full court rehearing after the limited *en banc* panel issues a decision, and none have been granted.

Over the last three years the court has heard an average of seven *en banc* cases a year, one case heard *en banc* for each 378 disposed of on the merits (see p. 29). The 1:378 ratio is one of the lowest in the country (e.g., during the same time period the 5th Circuit's ratio was 1:147 and the 11th Circuit's ratio was 1:145). As the volume of *en banc* business reflects, intercircuit conflicts are rare in the Ninth Circuit.[2] For a more detailed discussion of consistency in the Ninth Circuit, see Hellman, "Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court," 56 University of Chicago Law Rev. __ (Spring 1989).

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[1] The court's coding system has been considered by other circuits and the Supreme Court of the European Community as a model for managing their caseloads.

5. Collegiality

The judges of the court of appeals have maintained the effective personal communication and spirit of trust and confidence essential to judicial deliberations. The members of the court appreciate the need for collegiality and actively pursue it. Three-judge panels are drawn from a common pool under a computerized system designed to allow each judge to sit with every other judge with equal frequency. (The paneling practice not only promotes collegiality; it also promotes a fair distribution of cases to the various judges of the court.) All active judges assemble every other month for a court meeting; those serving on the executive committee meet every month. The judges also meet at the annual judicial conference and at a midwinter workshop to discuss mutual concerns. Once each year, the judges devote three or four days to a symposium devoted entirely to matters affecting the general welfare of the institution as distinguished from the decision of particular cases or the solution of routine administrative problems.

The electronic mail network continues to bind the family of the court. All judges and court officers are linked electronically through a computer network. This new technology has virtually eliminated any barriers to communication and collegiality created by great distances between judges' chambers. Literally with the press of a button, draft opinions and memoranda are circulated to other panel members or to the entire court for consideration and comment. Dispositions are electronically sent to the clerk's office for filing. Electronic mail is also effective in handling emergency matters and in circulating *en banc* correspondence.

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[2] In 1988, the Supreme Court granted certiorari in 14 Ninth Circuit cases, the lowest certiorari-to-merit disposition ratio in the country.

6. Caseload

The caseload of the court of appeals continues to increase at an unprecedented rate. Filings in court year 1987 totaled 5652, up 7 percent over court year 1986. In court year 1988, filings totaled 6334, 12 percent over those for court year 1987. (In calendar year 1988, filings rose 21% over those for 1987.) It is likely that this trend will continue in light of the number of projected challenges to the new sentencing guidelines and the dramatic increase in prisoner filings (see pp. 24-25).

Despite the increase in filings, reduced use of visiting judges (the Ninth Circuit had the third lowest rate of visiting judge participation in 1988), and the fact that there were three judicial vacancies on the court for most of calendar year 1988, terminations increased by 17% over 1987. Although terminations remain slightly below filings, the court should be able to remedy that situation when all court vacancies are filled and the newest judges reach peak efficiency (see p. 23).

7. Disposition Times

The median time from filing an appeal to disposition steadily declined with the advent of the court's innovation programs. The latest available figures show that the median time is 14.5 months, almost 30% lower than it was when the innovations project began in 1981.

The court has experienced a slight increase in the past couple of years, but it is important to note the greater portion of the 14.5 months is spent by court reporters and attorneys in record preparation and briefing to get the case ready for submission. The time cases are held under submission in the Ninth Circuit is below the national average (see p. 28), and cases are generally assigned to calendars within 60 days of being fully ready.

Although the court has taken great strides in lowering its median disposition time in face of increased filings and judicial vacancies, the Ninth Circuit continues to strive for improvement. As indicated above, the majority of the delay occurs in the presubmission phase. In the last few years, the court has taken several steps to address the problem by refining the motions practice, establishing tighter briefing schedules, utilizing the automated docketing and calendaring programs, monitoring district court reporters, and creating alternative briefing for parties proceeding without an attorney. The court expects that these steps will reduce the average disposition time in spite of the increasing caseload.

a. Motions Practice

More than 10,000 motions were filed in the court every year from 1986 to 1988. The court recognized that the delay in processing motions would lead to a delay in processing cases on the merits. In 1989, the court formally adopted a revised motions practice that had been phased in on an experimental basis beginning in June 1987 when there was a four-to five month delay in processing motions.

The revised motions practice involved two major changes to existing court procedures: (1) substantive motions (e.g., motions for a stay pending appeal) would be researched and presented orally by the more experienced attorneys of the central staff to a panel of judges in San Francisco; and (2) the clerk's office would create a separate procedural motions unit to handle the bulk of the procedural motions (e.g., motions for extensions of time) filed in the court.

The revised motions practice provided several real benefits to the court. First, under the former system, staff attorneys prepared written memoranda for all motions. These motions, and the accompanying materials, were then sent to the judges by mail. The new system requires written memoranda only in complex motions and avoids the time lost in mailing materials to the judges. Second, the creation of a separate procedural motions unit allows staff attorneys to devote more time to substantive motions that require legal analysis. Third, procedural motions are processed with greater speed and efficiency under the new system. Fourth, presentation of motions to a panel sitting in San Francisco allows the judges to meet face-to-face which aids in the decision-making process. Motions for reconsideration have dropped since these new procedures were instituted.

The revised motions practice allows the court to process more motions as the demand increases. In 1987, a four-to-five month delay existed in processing motions through the court. Today there is no backlog; substantive motions are presented to a panel of judges as soon as the motion is ready. The court processed over 3500 substantive motions in 1988, a 36% increase over 1987 when the revisions were first implemented and a 69% increase over 1986 figures when the former system was in place. In its first year as a fully operational unit, almost 8,000 procedural motions were processed and 80% of these were processed within two days of filing, down from an average of 10-14 days before the new procedures were instituted.

b. Briefing Schedules

The Ninth Circuit has also recently adopted measures to reduce the delay in getting cases fully briefed. The new measures place more restrictions on obtaining extensions of time for filing briefs, impose stringent penalties for failure to file timely briefs, and establish a presumptive briefing schedule for civil cases. (The presumptive briefing schedule establishes due dates for briefs and other necessary documents at the time a case is first filed in the court.) All these measures encourage parties to prosecute their appeals without delay which should help reduce the average time spent in the prebriefing and briefing phases of an appeal.

c. Increased Monitoring of Caseload

Automated calendaring and docketing programs make it easier to monitor the court's ever-increasing caseload for unusual delays. The calendaring program also insures that the oldest cases and the cases with statutory priorities are calendared before more recent cases. The new PANCAL program (discussed below at p. 31) should further improve the efficiency of the calendaring process.

In addition to computer monitoring, the staff constantly monitors the court's caseload to look for trends in problem cases so that the court can respond accordingly. The new case management attorneys will be responsible for this monitoring function. (See p. 61 for a fuller discussion of case monitoring.)

d. District Court Reporters

One of the primary causes of delay in the presubmission phase of an appeal is the delay in obtaining transcripts of the district court proceedings. This delay is unrelated to the size of the court of appeals but is related directly to the heavy workload on the district court level. Unfortunately, reporter problems in the district court are magnified to create even larger problems for the court of appeals. The clerk of the court of appeals works closely with the district courts to identify reporter problems and resolve them as soon as possible to avoid delays in processing appeals. The judicial council established a task force of circuit and district court judges and administrators to develop solutions to this problem.

e. Alternative Briefing

Pro se appeals, which comprise nearly one-third of the court's filings, present special problems for the court of appeals. Even with generous interpretations of the rules, *pro se* litigants often cannot satisfy minimum requirements. Furthermore, when a brief is eventually filed on behalf of a *pro se*, it is often useless because of a party's failure to provide the court with pertinent information.

To deal with this problem, the court has developed an optional form brief for *pro se* appellants. The form brief focuses the appellant's arguments and simplifies the process of perfecting an appeal for the appellant. The concept of the form brief, and an accompanying information packet, are under consideration by the full court. The court anticipates that adoption of an alternative, or form, brief will assist *pro se* litigants and also speed the process of handling their cases.

8. Formal Studies

As part of the Ninth Circuit's effort to probe for ways to improve the court beyond the goals established in the 1982 Innovations Project, the court has conducted several in-depth studies of its practices and procedures. These studies contain numerous solid proposals that have been implemented by the court or which have been given serious consideration. Each of the reports reflects the court's serious commitment to the spirit of section 6.

a. Long-Range Planning Report

In August 1987, the court completed an exhaustive 64-page report on the design, organization and practices of the Ninth Circuit. The report dealt with issues ranging from space needs to the novel concept of subject matter organization of the court. As a result of this report, the court created several of the new programs discussed above, e.g., presumptive briefing schedules, increased vigilance in maintaining consistency, case management attorneys to monitor consistency, revised motions practice, and increased monitoring of cases under submission. In addition, the report led to a thorough examination of the proposal to decentralize the staff and to create special subject matter panels in the court. The report is discussed in more detail on page 38.

b. Staff Attorney Study

The court also conducted an extensive study of the operations of the office of staff attorneys. The study assessed the functions and performance of the staff; it also established priorities for the office. As a result, the court recommended development of alternative briefing for *pro se* litigants and the transfer of most case management duties to the clerk's office.

c. Academic Study

In 1988, a group of distinguished academicians undertook a study of the future of the federal courts in light of the ever-increasing workload. The study considered various alternatives to meet the challenges of the next century and focused on the Ninth Circuit as illustrative of how large circuits could operate. See Arthur D. Hellman, ed., *Justice*

Restructured: The Innovations of the Ninth Circuit and the Future of the Federal Courts (Cornell, forthcoming 1990). The court of appeals was also the subject of an extensive survey of the bar. For more information, see page 60.

9. Public Access to Information

The Ninth Circuit Court of Appeals has sought to increase its accessibility to the bar and the public with minimal incursions on staff and judicial resources. In addition to a two-person public information unit that responds to public inquiries, conducts docket searches, and provides tapes of oral arguments, the court has supplemented these services through several technological devices.

In 1989, the court of appeals was the first appellate court to go on-line with ACOPS -- the Appeals Court Opinion Posting System. Developed by the court and the Federal Judicial Center, ACOPS is an electronic bulletin board system that allows outside computer users to gain instant access to the most recent published appellate opinions and orders, the calendars of oral arguments, and special notices and rules. Anyone with a computer and a modem can access the system without charge. Advantages of the system include reduced telephone calls, paperwork, and mailing for the clerk's office, and instant access to court opinions for the bar and public.

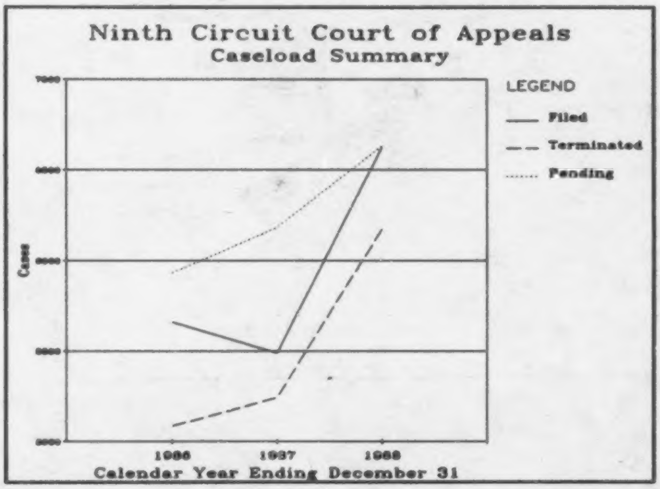
The court of appeals is also pilot testing two other technological means of improving access to its information data base. The first is VCIS -- Voice Case Information System -- that allows a touch-tone telephone caller to obtain basic case status information from a synthesized simulated voice. The other is PACER -- Public Access to Court Records -- that allows personal computer owners to dial into the system and search through case and party information to retrieve a specific case docket. Both of these advances in automation will go a long way to opening the court of appeals for wider dissemination of public information while relieving staff resources to concentrate on more efficient case management.

10. Ninth Circuit Statistical Summary

Ninth Circuit Court of Appeals

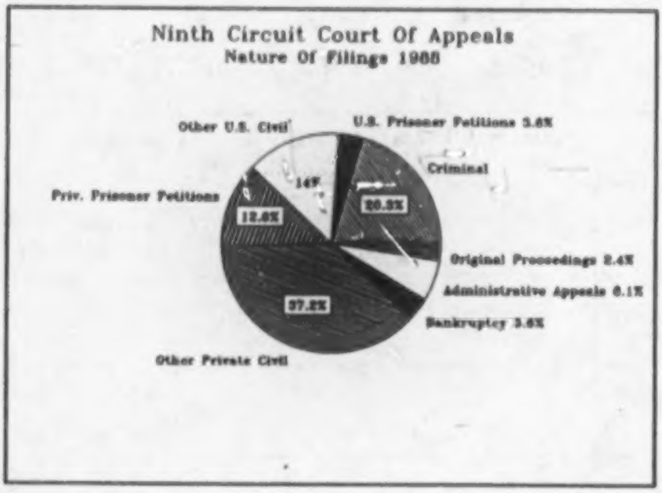
Caseload Summary

	1986	1987	1988
Filed	5659	5490	6621
Terminated	5085	5244	6170
Pending	5932	6178	6633

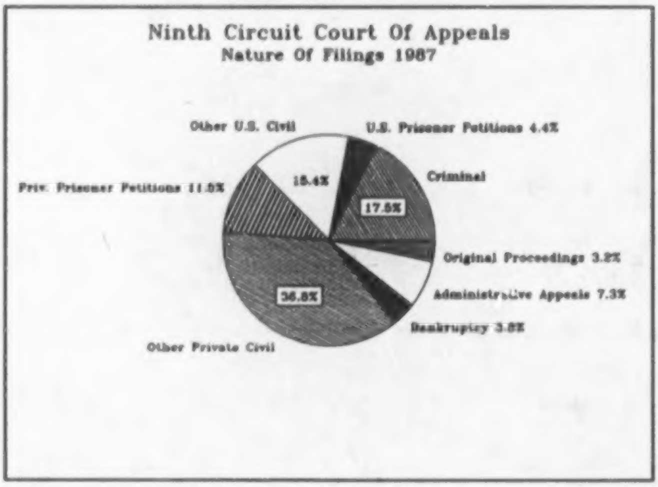


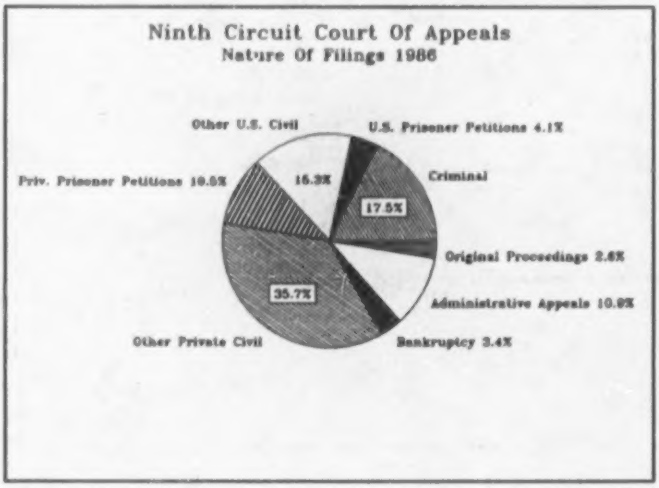
Ninth Circuit Court of Appeals
Nature of Filings 1986-1988

	1988	1987	1986
Criminal	1346	963	990
U.S. Prisoner Petitions	241	244	232
Other U.S. Civil	929	844	866
Private Prisoner Petitions	834	629	596
Other Private Civil	2466	2021	2018
Bankruptcy	239	209	193
Administrative Appeals	405	402	617
Original Proceedings	161	178	147
Total	6621	5490	5659



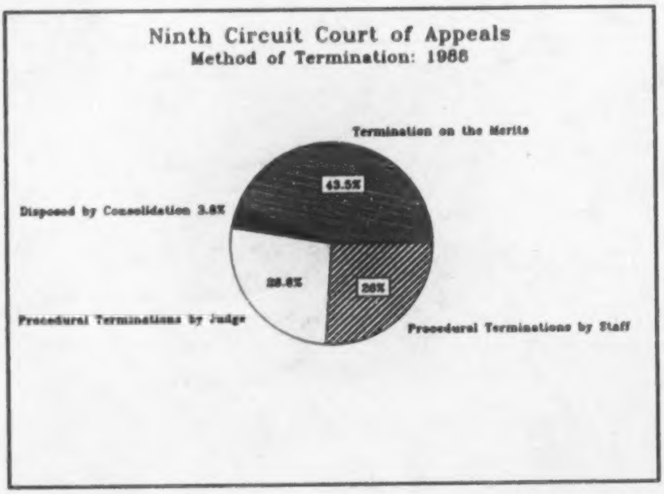
Ninth Circuit Court of Appeals
Nature of Filings



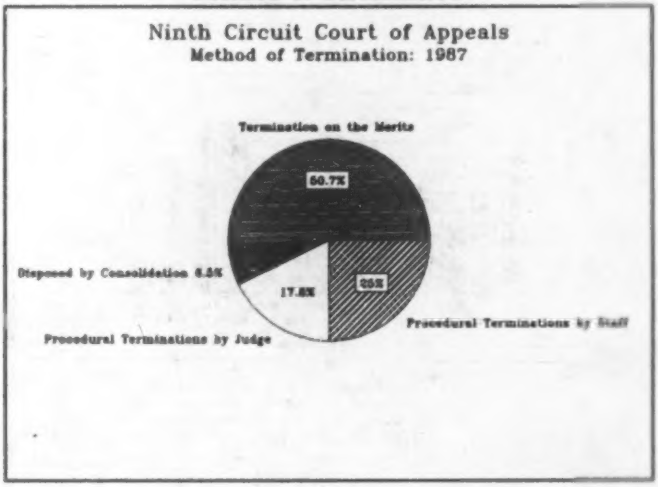


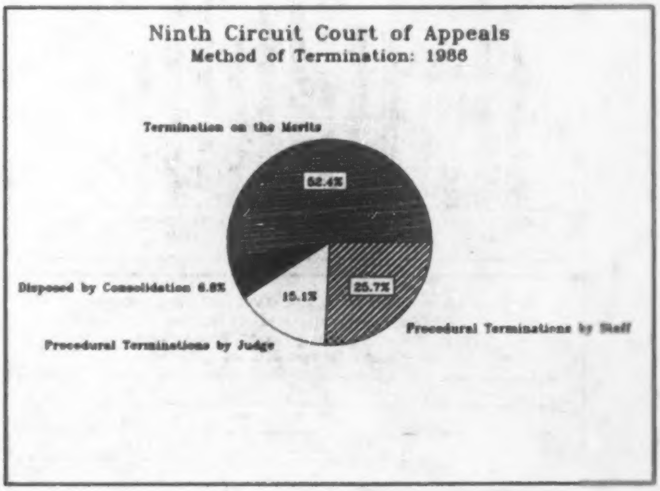
Ninth Circuit Court of Appeals
Method of Termination

	1986	1987	1988
Termination on the Merits	2636	2660	2686
Procedural Terminations	2054	2241	3249
a. By Judge	759	932	1644
b. By Staff	1295	1309	1605
Terminations by Consolidation	340	343	235
Total Cases Terminated	5030	5244	6170

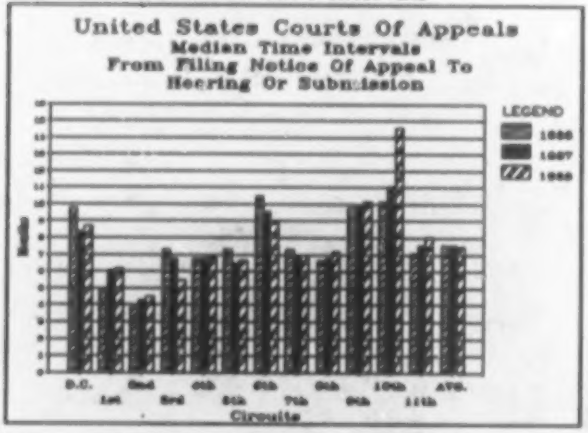


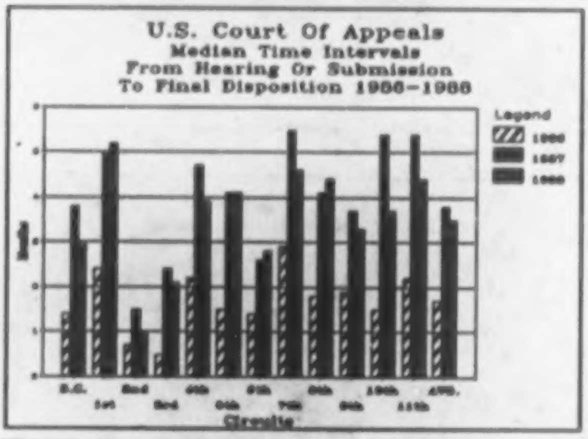
Ninth Circuit Court of Appeals
Method of Termination

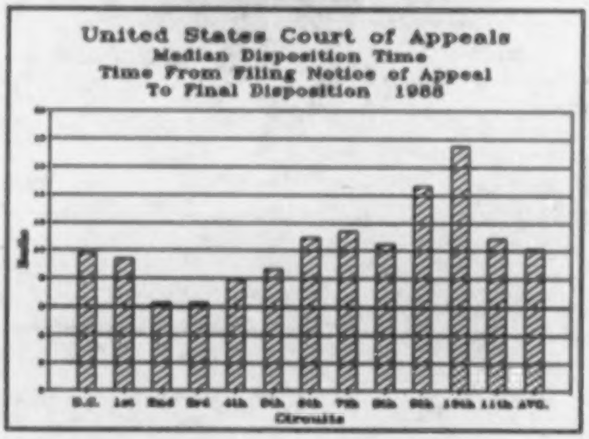

Ninth Circuit Court of Appeals
Method of Termination: 1987


Ninth Circuit Court of Appeals
Method of Termination: 1986

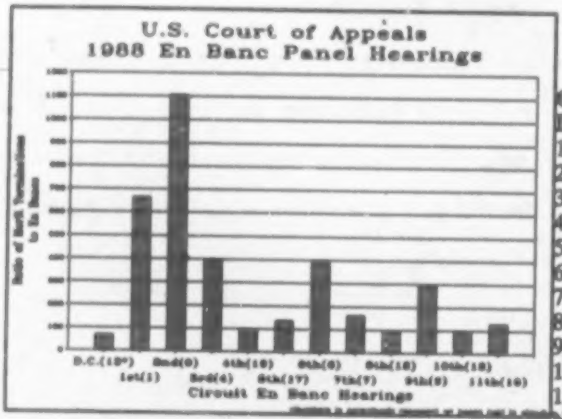
U.S. Court of Appeals
Median Time Intervals



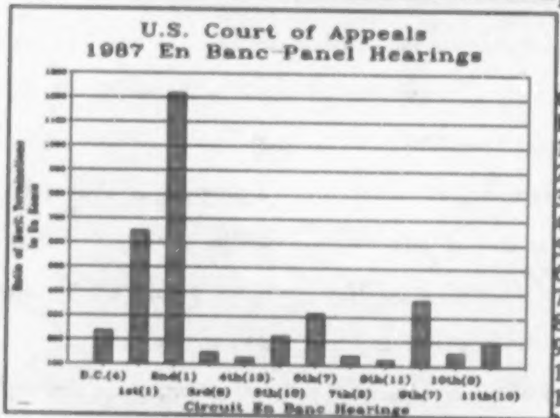




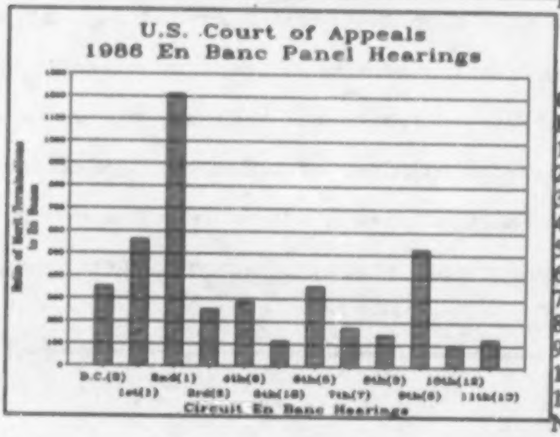
U.S. Court of Appeals En Banc Ratios



Circuits	Ratio of Merit Terminations to En Bancs
D.C.	69:1
1st	666:1
2nd	1107:0
3rd	393:1
4th	101:1
5th	138:1
6th	390:1
7th	163:1
8th	99:1
9th	300:1
10th	95:1
11th	130:1
Nat'l Avg.	164:1



Circuits	Ratio of Merit Terminations to En Bancs
D.C.	237:1
1st	651:1
2nd	1218:1
3rd	151:1
4th	130:1
5th	219:1
6th	315:1
7th	142:1
8th	127:1
9th	372:1
10th	155:1
11th	201:1
Nat'l Avg.	210:1



Circuits	Ratios of Merit Terminations to En Bancs
D.C.	354:1
1st	565:1
2nd	1214:1
3rd	257:1
4th	291:1
5th	116:1
6th	359:1
7th	177:1
8th	146:1
9th	527:1
10th	98:1
11th	128:1
Nat'l Avg.	202:1

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B. Administration

Court of appeals administration is carried out primarily through the work of the court of appeals executive committee, meetings of the full court, and actions of the chief judge and the chief judges of the three administrative units with support from the four principal staff offices. The management efforts of each of these groups is substantially aided by an array of automation and computer technology.

1. Automation

The Ninth Circuit Court of Appeals has demonstrated how a large appellate court can use automation to manage its caseload fairly and efficiently. Beginning in 1986, the court became the first to completely computerize its docket with the New Appellate Information Management System (NewAIMS). The court now maintains an almost completely "paperless" docket, recording all information in a computer database.

Through the NewAIMS automated docketing system, the clerk's office has the capability of closely tracking the status of cases. The system incorporates a tickler system and automatically generates various forms and notices. For instance, if a party fails to meet a deadline in processing an appeal, the computer will generate a form notice advising the party that the appeal may be dismissed unless the deficiency is remedied. NewAIMS also generates detailed caseload reports for case managers and judges that enhance caseload evaluations and permit experimentation with sophisticated case management techniques.

The second phase of the NewAIMS project has two features: automated calendaring and panel generation (PANCAL) and direct access by judges in their chambers to docket information. PANCAL will also integrate into one computer system (from computers located in Washington, D.C. and San Francisco) issue coding and inventory tasks. These features will be particularly useful for avoiding intracircuit conflict by immediately alerting all judges to cases that raise similar issues which are pending before the court. While the software has been tested, the court has been unable to implement it for lack of funding. The new systems will give the clerk's office valuable case management control capability, increase case processing speed, improve intracircuit conflict avoidance, and reduce staff time devoted to these responsibilities.

Another new advance in automation being tested in the clerk's office is automated processing of new appeals from district courts. The software, developed by the FJC, will permit a district court to transmit case information related to the appeal electronically to the court of appeals, obviating paper delays and reducing processing and staff involvement at the court of appeals. A pilot project between the District of Arizona and the court will begin in late 1989.

Automation has clearly been a keystone in the court's efforts to manage and control its burgeoning workload. Automation -- including linking judges chambers by electronic mail, vastly expanding personal computer use in chambers, and integrating NewAIMS docketing and case reporting features -- has had a valuable side benefit as well: increased communication and interaction among all members of the circuit.

The level of automation achieved today is a fraction of what is possible and available in the marketplace, yet it is already far beyond anything contemplated in the first report this circuit submitted to Congress in 1982. The network created by the automated systems now in place have contributed, more than any other single device, to increasing the sense of community and accessibility within the circuit. With more Congressional funding for automation, and the improvements in software and hardware that are sure to follow, every circuit in the near future should be able to expand without fear of diminishing contact or collegiality among its members.

2. Administrative Units

In 1978, Congress authorized courts of appeals with over 15 judges to create administrative units for more efficient circuit administration. Within 90 days of the appointment of its 16th judge, the court of appeals established three administrative units, each headed by the senior active judge residing in the unit. The court created a Northern, Middle, and Southern administrative unit, with administrative centers located in Seattle, San Francisco, and Pasadena.

Administrative units give the court greater flexibility to manage its staff and facilities, but the units are not autonomous divisions for either management or caselaw development. The court of appeals creates a unitary body of law as a result of two longstanding policies governing the assignment of judges: (1) each active judge sits with every other active judge with equal frequency; and (2) each active judge sits on approximately the same number of panels in each administrative unit. These policies, fostered by the division into administrative units, actively contribute to the atmosphere of collegiality that is essential to preserving the Ninth Circuit as a single entity.

The first fully-established administrative unit headquarters in San Francisco was followed in 1986 by the renovation of the southern administrative unit headquarters in Pasadena. Both headquarters are fully equipped with courtrooms, chambers for permanent and visiting judges, administrative office space, and complete libraries. Seattle maintains a more limited facility for lack of space. Through the administrative units plan, the court of appeals maximizes decentralization in management for functions that are better performed locally, and at the same time retains the unity and cohesiveness required to maintain collegiality over a large geographic area.

3. Administrative Chief Judges

In each of the three administrative units, the senior active resident circuit judge presides as the administrative chief judge. Administrative chief judges serve on the court of appeals executive committee and meet regularly with the chief judge to discuss administrative issues throughout the circuit. Within the unit, the administrative chief judge responds to the administrative needs of the circuit judges in the unit, oversees staff operations within the unit, and relieves the chief judge of a variety of local administrative tasks. The administrative chief judges also sit on the judicial council in rotation for one-year terms.

As the responsibilities of managing a large circuit expand, the duties of the chief administrative judges have also grown. Administrative chief judges:

- act as informal "duty judges" for conference attorneys;
- review complaints of judicial misconduct at the request of the chief judge;
- serve as a liaison with the district courts;
- review space needs and facility improvements;
- act as a liaison with bar associations;
- represent the circuit at investitures and other ceremonies; and
- advise the chief judge and judicial council of trends and concerns in their unit.

4. Court of Appeals Executive Committee

In 1982, as part of its effort to streamline and enhance administrative responsiveness, the court of appeals expanded the duties and authority of its executive committee. Consisting of the chief judge, the three administrative chief judges, and five other active judges drawn by lot for a one-year term from among those willing to serve, the executive committee acts for the full court in several capacities. It handles routine administrative matters and emergency matters that require action before the next scheduled meeting of the full court. More importantly, the executive committee solicits, generates, and evaluates a wide range of proposals and suggestions for improving the operation of the court. It then develops concrete proposals and makes recommendations for the full court to consider.

The executive committee meets monthly to consider an agenda and supporting materials prepared by staff. The committee carefully reviews proposals put before it, and often returns them to staff for further research and refinement. Executive committee action in routine areas is implemented immediately; actions in non-routine areas are submitted to the full court for final approval and implementation.

Examples of executive committee actions over the past two years include:

- authorized the electronic transmission of written opinions directly to an outside computer typesetter to reduce opinion disposition time;
- investigated and vested authority in the civil motions attorney to grant voluntary motions to dismiss without prejudice, reducing the need for judicial intervention;
- proposed and authorized the transfer of procedural motions handling to the clerk's office from the staff attorneys, to free up attorneys for motions research;
- established an ad hoc committee on court of appeals automation matters to obtain a wide array of viewpoints on automation needs;

- proposed and oversaw the simplification of the case weighing and inventory process for quicker case processing and better monitoring of intracircuit conflicts;

- supported the idea of setting civil briefing schedules upon filing of the notice of appeal to expedite case flow;

- sought and obtained Federal Judicial Center support to establish the clerk's office as a pilot site for the Appeals Court Opinion System (ACOPS), allowing the public and press instant computer access to recent opinions and court calendars.

5. Meetings of the Full Court

The primary function of a court of appeals is to decide cases. In keeping with that mandate, the Ninth Circuit makes every possible effort to reduce the amount of judicial time spent on administration. Both the executive committee and the administrative chief judges substantially reduce the administrative burden on individual judges, releasing them to devote more time to reviewing and deciding cases.

The full court meets every other month to address policy matters affecting the operation of the court as a whole. The chief judge reports on the state of the court while each administrative chief judge advises the court of operations within the administrative unit. Staff officers update the court on the status of the docket and issues affecting the court's productivity. Committee members report on proposals and recommendations for the full court's consideration.

The agenda is derived primarily from matters studied by the executive committee. Each issue is presented by a member of the executive committee. This two-tiered system -- careful preparation, discussion, review, and revision by the executive committee, followed by consideration by the full court -- allows the court to continually reevaluate its operations and to control its administrative affairs without unduly burdening judicial resources. At the same time, the court's bi-monthly meetings are another essential element that supports the court's atmosphere of collegiality.

Full court meetings have addressed a wide range of policies over the past two years. Recent actions of the court include:

- adoption of special procedures to handle death penalty appeals and stays of execution;
- implementation of structural changes to process substantive motions on a more timely basis;
- transfer of case inventory and case management functions from the staff attorneys to the clerk's office;
- approval of an expedited procedure to handle bail motions in criminal appeals;
- review and support a draft handbook for preparation of appellate transcripts;
- consideration of a variety of mechanisms for possible implementation to reduce the median disposition time of appellate cases; and
- approval of the concept of a court of appeals executive to oversee the administrative responsibilities of the court.

Two standing committees assist the court in its work. The Standing Committee on Appointment of Bankruptcy Judges makes recommendations to the full court on procedures for soliciting and selecting bankruptcy judgeship candidates. It provides assistance and support to local merit screening committees, reviews their recommendations, and makes its own recommendations directly to the full court on potential appointments. The Standing Committee on Appointment of Federal Public Defenders performs the same functions for the court and local screening committees in connection with the four-year appointments of Federal Public Defenders. Since 1986, both committees have been busy with the appointment or reappointment of over 40 bankruptcy judges and a half-dozen Federal Public Defenders.

The Advisory Committee on Rules of Practice and Internal Operating Procedures also assists the court in its work. In addition, a long-range planning committee and the Federal Judicial Center provide assistance to the court by recommending methods to improve appellate case processing.

a. Advisory Committee on Rules

Congress mandated the creation of an Advisory Committee on Rules in the Federal Court Improvement Act of 1982, Public Law 97-164. The Ninth Circuit's Advisory Committee on Rules comprises 16 members: four lawyers from each administrative unit, one legal scholar, and three circuit judges. In 1986, the Advisory Committee completed the first phase of its work in updating the court's rules and renumbering them to follow the sequence of the Federal Rules of Appellate Procedure. The committee just completed the second phase of its work of incorporating the court's internal operating procedures into Advisory Committee Notes. As required by Federal Rule of Civil Procedure 83, the court circulated the local rules for public comment before adopting the revisions. The committee is now considering the responses.

b. Long-Range Planning

In 1986, the executive committee created an Ad Hoc Committee on Long-Range Planning to examine the future of the court and to make recommendations for means to cope with the increasing caseload. In 1987, the committee, as part of its report (see p. 21) released a series of recommendations that served as the basis for full-court discussions and debate. Although now disbanded, the committee recommended that the court:

- set briefing schedules at the time of filing the notice of appeal (implemented);
- simplify case weighing and inventory procedures (implemented);
- establish a space management office in the office of the circuit executive (partially implemented);
- conduct a study of the potential uses of appellate magistrates (partially investigated).

c. Federal Judicial Center

The Federal Judicial Center (FJC) supports the court and its executive committee in two principal ways: by conducting research projects and by designing computer software for clerk's office operations. At its own request, the Ninth Circuit has been the subject of numerous studies into its operations. In 1985, the FJC released *Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project*. The 167-page report concluded that increasing the number of judges, instituting modifications in oral and non-oral argument calendars, and conducting pre-briefing conferences all contributed to eliminate the court's serious backlog and to reduce the court's disposition time to levels comparable to smaller circuits.

More recently, the FJC completed a full review of the operations of the Bankruptcy Appellate Panel. The FJC report, *Bankruptcy Appellate Panels: The Ninth Circuit Experience* (1989), concluded that these model panels substantially improved the quality of appellate review and reduced the number of appeals to the court of appeals, all with a high level of satisfaction expressed by the bar.

In the area of computer software design, the Federal Judicial Center has taken the lead in developing NewAIMS and adapting it to the needs of the circuit. The FJC has also written and tested each of the other new programs at the court, including PANCAL, ACOPS, VCIS, and automated docketing from the district court. The valuable contributions of the FJC, supplemented by the court's own experienced computer operations personnel, have increased the court's efficiency and forged an impressive arsenal of technological links that help keep the circuit together.

6. Staff Offices

a. Office of the Circuit Executive

The circuit executive is the chief administrative officer for all non-judicial functions of the circuit and provides management assistance to the court of appeals, the district courts, and the bankruptcy courts. The circuit executive's responsibilities fall into three main categories:

- administrative assistant to the chief judge of the circuit,
- secretary to the Ninth Circuit Judicial Council, and
- primary liaison between the courts and outside agencies, organizations, and the public.

The circuit executive is responsible for administering the office of the circuit executive, consisting of 25 staff, including five assistant circuit executives and ten specialists. Specific duties and responsibilities of this office can be categorized in six main fields:

- Technical services: provide telecommunications support for all courts in the circuit; coordinate purchasing and oversee the installation of personal computers in all courts in the circuit; conduct management studies and surveys; coordinate intracircuit assignments of judges;
- Legal affairs: provide legal research and analysis for judicial committees; investigate judicial misconduct complaints;
- Space and facilities: analyze, evaluate, plan, and supervise all major space and facilities requirements throughout the circuit; serve as liaison between courts and other agencies and contractors to perform the work;
- Personnel and training: furnish personnel information and advice for all court employees; draft and monitor court EEO plans; support and staff court education committees;

- Communications: manage the annual judicial conference; serve as public information officer; publish an annual report and quarterly newsletter; act as liaison with lawyers and bar associations; host visits by foreign judges;

- Budget decentralization: coordinate and monitor the five pilot courts involved in the budget decentralization project.

The office of the circuit executive discharges a broad range of administrative responsibilities in service to the judiciary and plays a key role in experimental and reform projects designed to improve the court's management efforts. Each year on behalf of the judicial council, the circuit executive draws up an annual action plan of priority projects and goals for study and implementation. Recent significant accomplishments include:

- designed, conducted, and analyzed circuitwide surveys of the operations of the bankruptcy, district, and circuit courts for review at judicial conferences;

- staffed and assisted in implementing the U.S. Trustee system in the circuit;

- helped to introduce, implement, and evaluate the use of the one-day/one-trial jury management system in the district courts;

- coordinated and staffed a circuitwide training effort in the application of the new sentencing guidelines;

- managed the court of appeals' reorganization of its committee structure to align with the new U.S. Judicial Conference committee reorganization;

- completed work on creation of a handbook to assist clerks in preparing internal financial control manuals and mechanisms;

- worked with the Task Force on Death Penalty Habeas Corpus and other organizations to establish two death penalty resource centers within the circuit.

The duties of the office of the circuit executive continue to expand with the growth in the size and workload of the courts in the Ninth Circuit. The office has made increasing use of automation and computer technology to improve communications and linkages among all parts of the courts, with greater improvements envisioned once the funding is found to install state-of-the-art computer hardware and software.

b. Clerk's Office

The clerk of the court of appeals is the chief administrative officer for the court of appeals and oversees all matters relating to the operation of the court. A number of significant developments have occurred in the clerk's office over the past several years to substantially improve the clerk's ability to monitor and supervise the work of the court.

Some of the automation and technological improvements have already been catalogued, including the NewAIMS automated docketing system, the PANCAL automated calendaring and panel generation system, and electronic mail. (See p. 31.) Each of these has changed the way of doing business in the courts, and has contributed enormously to the clerk's office's ability to maintain current dockets and provide the judges and public with up-to-date case information.

On the management side, the court recently adopted, in principle, the concept of a court of appeals executive. The executive concept centralizes management responsibility for the court of appeals with the clerk of court. The clerk is responsible for all operational aspects of the court including the office of staff attorneys. The circuit executive's office relates to the court of appeals in the same way as it relates to all other courts within the circuit: by providing management expertise and assistance at all levels. The circuit executive's office provides staff support to the court of appeals Standing Committee on Federal Public Defenders and Bankruptcy Judge Selection, and maintains all responsibility for space and facilities. This realignment of managerial responsibilities improves administrative responsiveness and prevents unnecessary overlap of administrative functions. Two other functions have been transferred to the clerk's office for greater flexibility and economy. All procedural motions are now acted upon by a procedural motions unit within the clerk's office -- this function has been transferred from the office of staff attorneys. The realignment has vastly improved caseload control and frees up staff attorneys to work on substantive matters. Permanent staff in the clerk's office are authorized to act on a variety of procedural motions, reducing turn-around time at this stage of the proceedings from 10-14 days to 1-2 days for over 80% of these matters.

Another responsibility being transferred from the staff attorneys is the case inventory, case weighing, and issue spotting functions. With the expected integration of several computer systems, this task will become partially automated. Including it within the clerk's office will increase the effectiveness of case management efforts and will improve the ability of the court to alert panels to possible inconsistencies in panel opinions.

Each of these new developments in the clerk's office has been designed to improve efficiency, reduce conflicts in decisions among panels, and generally expedite case flow and case processing. The full effectiveness of these measures is hampered, however, by serious problems of: 1) reduced personnel -- operating at the 90% staffing level due to budgetary constraints; 2) hardware deficiencies from an overworked main computer with slow response times; and 3) continuing space problems that were only partially alleviated by the consolidation of operations on the first floor of the San Francisco courthouse in 1989.

Some of the functions of the clerk's office have been partially decentralized to the three administrative units to provide better and more direct services to the judges and the public. Most clerical functions are performed in San Francisco, but the court periodically reevaluates assigning additional functions to divisional offices in Pasadena and Seattle.

The Pasadena office consists of seven employees and is directly linked to the NewAIMS system. In addition to entering all new appeals from the Central District of

California, Pasadena staff carefully monitors preparation of the case record and is authorized to set briefing schedules in cases filed with it. Clerk's office staff in Pasadena also provide direct assistance to judges in the Southern administrative unit, as well as telephone, space, and computer support. Consideration is being given to adding permanent computer support personnel to this office. One employee continues to staff the Seattle divisional office, with microfiche access to case information for the bar and the public.

c. Office of Staff Attorneys

The court's central legal staff works closely with the judges and the clerk's office to manage the court's caseload by assuring that each matter is resolved as judiciously and efficiently as possible. Staff attorneys engage in a broad spectrum of activities:

- assist the court with research on all substantive motions filed before a case is submitted to a merits panel;
- present and prepare proposed orders for each motion to a panel of judges;
- conduct almost 900 prebriefing conferences a year;
- check for jurisdiction in all cases filed in the court before they are calendared for argument;
- insure that the judges receive a rationally organized workload by screening all appeals before submission to identify issues and classify them in legally relevant ways;
- coordinate all emergency motions work, including a 24-hour a day, 7-day a week emergency telephone service;
- research and draft legal memoranda on the merits of over 600 cases a year;
- provide law clerk assistance to newly appointed judges and judges facing a temporary vacancy in a clerkship line;
- monitor new decisions for potential conflicts;
- provide valuable assistance to the bar by answering questions on how to process their appeal and emergency motions;

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- notify the court when several panels have cases that raise the same issue; and

- provide reports, recommendations, evaluations, and proposals concerning a variety of judicial administration topics.

Like other court offices, the office of staff attorneys has entered the age of automation. Ninth Circuit staff has used the sophisticated capability of the word processing equipment datafile system to create, store, report, and organize useful data. For example, the office has created a computerized legal memorandum index that allows it to locate recent memoranda by issue. The staff uses the computer to track all the cases and motions that are processed in the office, and to identify cases that raise the same issue on appeal.

In addition to providing the court with high quality legal research, the office of staff attorneys has become an integral part of the court's case management team. Senior staff attorneys meet regularly with the clerk's office to discuss ways to improve the smooth flow of cases through the court. They also continuously monitor the progress of cases to insure that cases from each of the court's administrative units progress quickly through the court of appeals.

d. Ninth Circuit Library System

Since 1986, the circuit has made substantial progress in upgrading its libraries. Using an administrative structure adopted in 1984 that is based on the concept of the National Court Library System, the circuit has established a headquarters library, satellite libraries, a Circuit Library Committee, and local library committees to set policy for the system.

The circuit has gained valuable experience operating its library system under this flexible, decentralized administrative structure. The system has increased productivity and has significant potential for providing essential coordination to achieve high quality library services. However, because Congress has not yet appropriated funds for additional staff positions that the U.S. Judicial Conference approved in 1986, the full benefits of the structure have not been realized.

In the past three years the library system has increased in size from 13 branch libraries to 17. In 1986 the libraries maintained shared collections in 25 locations; in 1989, the libraries maintain 36 shared collections. During this period, the number of judicial officers and staff served by Ninth Circuit libraries grew by 19%. For the same period, the libraries were given no additional staff until, in April 1989, two additional positions were provided, increasing the staff by 6%.

The Ninth Circuit library system's production of information and materials on demand has increased significantly in the past three years. In 1986 basic library service transactions -- reference, research, locating and getting books from other libraries, book circulation -- totalled 89,344; in fiscal year 1988 this number had grown by 30% to 127,118. Data for 1989 indicate that this level of productivity is being maintained. Library service transactions are as diverse as the information needs of the judges served by the libraries. They range from providing requested factual data from routine reference sources to preparation of legislative histories; searches of literature and preparation of subject bibliographies identifying, locating and providing legal subject materials; and research on a wide range of other subjects in connection with judges' duties on committees at every level.

Library staff works closely with judges to plan space and facilities to meet the courts' research needs in the future. Between 1986 and 1989, the libraries assisted in planning and completing the new branch libraries in Boise and San Jose, new shared library facilities in

Santa Ana, and new bankruptcy court libraries in Seattle and Anchorage. In addition, library staff assisted in planning new libraries in seven locations, and planned remodelled libraries in eight other cities.

Access to legal authorities and other sources via telecommunications increased dramatically between 1986 and 1989. Shared LEXIS and WESTLAW terminals were available in 20 locations in 1986; in 1989, computer-assisted legal research (CALR) terminals are provided in 37 locations. One judge had CALR in chambers in 1986; in 1989, over 180 judges in the Ninth Circuit have CALR in chambers. In 1986 only two library branches had microcomputers for routine, repetitive library tasks and as back-up terminals for CALR access. In 1989, twelve Ninth Circuit library branches have this equipment. The Ninth Circuit needs additional automated library systems to make possible shared library technical support services, e.g., computerized cataloging, for all of its libraries.

By utilizing better work methods, the library staff has substantially increased its productivity. However, the margin for providing more library services to greater numbers of users without adding library staff has now been exhausted. Some satellite libraries have already had to make cuts in essential work for maintenance of library resources and in hours of service. Ninth Circuit libraries now operate with a staff of 33, well below the U.S. Judicial Conference staffing formula that calls for one staff librarian for every six judicial officers. Under the conference formula, the circuit should receive 44 positions. This shortage of even a minimally adequate level of library staff has an adverse affect on the productivity of the judges and court staff served by the library.

To provide a satisfactory level of library services to the Ninth Circuit, the libraries need to be able to fill all 44 library positions plus a special additional staff allocation to manage the central, shared services of the libraries in all three administrative units. Congress must address the issue of inadequate library support and fund essential library positions to ensure that the Ninth Circuit is provided with the necessary resources to provide a professional quality and level of services.

II

Circuit Administration

A. Judicial Council

1. Organization

The Ninth Circuit Judicial Council is the chief policy-making body for all the federal courts in the Ninth Circuit. In 1980, when Congress passed the Judicial Councils Reform and Judicial Conduct and Disability Act, Public Law 96-458, the Ninth Circuit Judicial Council became the first to reorganize itself and simplify its administrative structure for more representative and responsive decision-making. It reduced its size to nine members: the chief judge, four circuit judges and four district judges. The council also invites a senior judge, the chair of the Conference of Bankruptcy Judges, and the chair of the Magistrates Advisory Committee, to sit as non-voting observers at its meetings. With balanced representation to ensure a diversity of experience and viewpoints, the Ninth Circuit Judicial Council is equipped to exercise its statutory duties responsibly and effectively.

The judicial council ordinarily meets quarterly to review the state of affairs in all the courts of the circuit. Much of its work is accomplished through an extensive committee structure patterned after the U.S. Judicial Conference and its committees. The committees and staff present background papers and research proposals to the council for review and action. To streamline and expedite decision-making between meetings, the council established a three-member executive committee consisting of the chief judge and two members whose positions rotate every six months. In addition, many routine council matters are conducted by telephone or mail balloting.

2. Committees

The work of the judicial council is performed through its extensive committee structure. Council committees invite and encourage participation from a broad range of judges, magistrates, clerks, lawyers, and academics with an interest in Ninth Circuit administrative governance. Committee membership selection procedures have been rationalized recently with the creation of a "committee on committees" to advise the chief judge on appointments. The committee on committees surveys all judicial officers for their interest in serving, and then recommends appropriate appointments to the chief judge. Careful effort is made to assure wide diversity and include members from every district within the circuit.

Judicial council committees are organized in different ways. Some -- like the Conference of Chief Bankruptcy Judges and the Magistrates Advisory Committee -- serve as a direct liaison with the judicial council. Advisory committees are standing committees of the council that oversee continuing issues of circuit interest. They include: automation, jury management, education, space and facilities, and the senior advisory board. Others -- particularly task forces -- address topical concerns and are set up for a specific purpose. Once they have addressed the issue and made a recommendation to the council, they are usually disbanded. Recent task forces have addressed: court reporter problems, sentencing guidelines, and internal financial controls.

In 1988, in response to a major committee reorganization by the U.S. Judicial Conference, the Ninth Circuit Judicial Council reevaluated its committee structure for possible improvements. For more effective national representation, the council realigned its committees and created four new committees to parallel those at the national level. New committees included: ethics, space and facilities, finance, and human resources.

3. Leadership by the Council

As the preeminent policy-making body of the circuit, the council provides administrative leadership to the courts in several ways. Through its rotating membership and extensive committee structure, the council invites the participation of a broad cross-section of the judiciary in its work. Through the annual judicial conference and the regular meetings of the courts' constituent groups, the council stays in direct communication with the circuit.

Since 1983 the council has used an annual action plan to focus its efforts on specific proposals to improve the administration of justice in the circuit. The circuit executive's staff, working with the various committees, conferences, and task forces, coordinates and supports the research and activities necessary to meet these goals and reports on their progress at each council meeting. Annually the council reviews and revises the plan to consider new directions for the coming year. The current plan was agreed upon at the August 1988 council meeting and will be revised at the judicial conference in July 1989.

Over the years, many annual action plan goals have been met, contributing both to the administration of justice at the circuit and the national level. A sampling of past successes includes: improved juror utilization rates, increased use of alternative dispute resolution techniques, implementation of court reporter management plans in all Ninth Circuit courts, and installation of the U.S. Trustee system in the circuit. The 1988-1989 annual action plan goals and projects include:

- establish death penalty resource centers to assist Criminal Justice Act volunteers to competently handle these difficult cases;
- review court personnel policies to develop model policies and a personnel manual;

- analyze the needs of the library system in light of critical personnel shortages and the influx of new technology;
- assist in setting up automation users groups for district and bankruptcy clerks to exchange information about personal computer applications to improve court operations;
- support efforts to establish a Western Justice Center in Pasadena to serve as west coast headquarters for national organizations involved in research and efforts to improve the administration of justice;
- develop a jury deskbook for trial courts with model forms and advice on better jury relations;
- continue implementation and analysis of the decentralized budget project in five pilot courts;
- study court reporter management for ways to improve transcript delivery and the use of technology;
- reactivate state-federal judicial councils to improve the relationships between state and federal courts in the circuit; and
- study more effective ways to use magistrates and publish recommendations and models for greater utilization.

B. Judicial Conferences

1. Conference of Chief District Judges

The 15 chief judges of the district courts in the Ninth Circuit meet semi-annually as the Conference of Chief District Judges. At each of the 1 1/2 - 2 day sessions, the chief judges report on developments in their districts, hear from members of the Administrative Office, and debate and discuss issues and problems related to district court management. The judicial council frequently seeks the opinion of the conference on district-court related issues, and the conference, through its two representatives on the council, apprises the council of its views on district and circuit matters.

At one of its two annual meetings, the chief district judges meet separately with the district court clerks to discuss common interests. Similarly, the judges meet separately with those who chair the lawyer representative delegations to the annual judicial conference to discuss issues of concern to practitioners before the federal courts. In addition to semi-annual meetings of the conference, all Ninth Circuit court of appeals and district judges assemble annually for a three-day Federal Judicial Center-sponsored midwinter workshop on educational topics of immediate concern to the judiciary. Through these annual formal and informal interactions the circuit works to keep open lines of communications with all of the principal actors in the court system.

Topics of discussion at the past several conferences have included:

- application and impact of sentencing guidelines;
- response to increased death penalty caseload;
- operation of the budget decentralization project;
- increased access to personal computers and computer-assisted legal research;
- possibility of new budget deficits and registry fees.

2. Conference of Chief Bankruptcy Judges

The 13 chief judges of the bankruptcy courts in the Ninth Circuit meet semi-annually as the Conference of Chief Bankruptcy Judges. These meetings parallel those of the chief district judges, and are used as part of a two-way vehicle for communication via the conference's chair who sits as an observer on the judicial council. At one of the two annual meetings, the chief bankruptcy judges meet with the bankruptcy court clerks to discuss matters of mutual concern. Principal topics over the past two years have included:

- office automation and use of personal computers (with "hands-on" training sessions);
- revisions to the bankruptcy judge selection process;
- contributions of the Bankruptcy Appellate Panel;
- issues of judicial exposure to liability;
- roles of the clerk and chief judge in judicial administration and management;
- internal financial controls and manual; and
- access to computer-assisted legal research equipment.

3. Ninth Circuit Judicial Conference

Mandated by Congress pursuant to Section 333 of Title 28 of the United States Code, the Ninth Circuit Judicial Conference convenes annually to consider the business of the courts and to advise means of improving the administration of justice within the circuit. After a comprehensive two-year study, the judicial conference was reorganized in 1974 to better fulfill its statutory mandate. Changes in conference structure included a reduction in size, a more focused program, and increased status and responsibility for lawyer representatives.

The judicial conference is administered by a 19-member executive committee of the judicial council. Executive committee members serve for staggered three-year terms, with the chair rotating among a circuit judge, a district court judge, and a lawyer representative. The committee includes a bankruptcy judge, a magistrate, and six lawyer representatives to assure broad-based representation in the year-long conference planning process. The office of the circuit executive provides staff and logistical support for the conference and executive committee.

The conference also establishes ad hoc committees from time to time to research and recommend solutions to various issues. In 1987, the Ad Hoc Committee on Attorney's Fees, and in 1988 the Ad Hoc Committee on Attorney Discipline, filed reports that were discussed at the judicial conference. In early 1989, the Ad Hoc Committee on Attorney Compensation and Pro Bono completed its study of pro bono representation. Its recommendation that each district adopt a model pro bono screening and appointment plan will be considered at the 1989 conference.

The Ninth Circuit Judicial Conference is not static -- efforts are continually underway to improve its effectiveness. In 1986, District Judge Owen Panner led a committee to study the structure and function of the conference. A number of his committee's recommendations to streamline the conference were implemented. In 1988, Circuit Judge Charles Wiggins was appointed to head a new committee to examine the purpose, size, and function of the conference. Its recommendations are due within the next year.

Each year the conference executive committee selects one or several conference themes for consideration by the members. In 1986, the theme was "The Courts as Others See Us," including surveys and reports on attorneys' and jurors' attitudes towards the functioning of the district courts. In 1987, the themes were "Management of the Ninth Circuit Court of Appeals" and "Bicentennial of the United States Constitution," including a survey of the court of appeals and how it is viewed by district judges and appellate lawyers. The 1988 conference themes were "Appellate Justice for the Twenty-first Century: Learning from America's Largest Court," and "Selection of Supreme Court Justices." The background materials for the court of appeals topic included over 200 pages of research conducted by ten academic researchers headed by Professor Arthur Hellman of the

University of Pittsburgh Law School. The final results of Professor Hellman's research are to be published in a book in early 1990. The conference theme in 1989 was "Partners in the Process" and dealt with issues of professionalism, performance expectations, and the future of the judiciary and the law profession.

Since the 1974 restructuring of the conference, its format has remained fairly constant. The conference opens with an introductory "State of the Circuit" report by the chief judge. The first substantive session usually features a nationally-recognized speaker or panel addressing the conference theme. Then the almost 400 conference members break into small groups to discuss the panel topic in greater depth. Near the end of the 3-4 day conference, the small groups report back their conclusions to the plenary assembly.

Delegates from each judicial district also meet separately at the conference, as does each category of judicial officer -- circuit judges, district judges, bankruptcy judges, and magistrates. Finally, the conference as a whole hears, debates, and votes upon resolutions to improve the administration of justice that have been submitted in advance by the members. Resolutions that are approved by the conference are forwarded to the judicial council for consideration and appropriate implementation. This is one of the most effective mechanisms of the conference for initiating change within the judicial system, and not infrequently Ninth Circuit resolutions have become adopted policy at the national level.

The Ninth Circuit Judicial Conference is a key element in the effort to maintain collegiality and open lines of communication within the circuit. Not just a one-time event, the judicial conference is a year-long process that involves judicial officers, court personnel, and practicing lawyers in a continuing effort to improve judicial administration.

4. District Conferences

Lawyers who represent the practicing bar in the federal courts play an integral role in the operation of the circuit and in the conduct of the annual judicial conference. Some 100 practicing lawyers are selected through a conference-approved process on a district-by-district basis for their interest and experience in federal practice. These lawyers regularly meet among themselves and with the judges in their districts to discuss problems and opportunities for the enhancement of court operations.

In addition to quarterly meetings, in about half of the districts in the circuit, the lawyer representatives and judges hold a special meeting once a year in a half-day or day-and-a-half format known as a district conference. Resident circuit judges, bankruptcy judges, and magistrates, in addition to most of the federal practitioners in the district, are invited to these weekend seminars. These valuable sessions are jointly planned and include both substantive and social sessions for the judges and lawyers to meet and candidly discuss common concerns. The executive committee strongly supports these efforts to spread the benefits of the annual conference to the local level.

C. Advancements in Management

1. Budget Decentralization

The Ninth Circuit has been an innovator and catalyst for the concept of decentralized financial responsibility in the judiciary. No court in the federal judicial system has responsibility for preparing its own budget or managing its own expenditures. Budgeting is done from Washington, D.C., based upon formulae, with limited input from the operating units. No allocation is made to the individual unit. Each unit must request authorization for each individual expenditure. There is little flexibility and no incentive to save.

The judicial council proposed a pilot study of decentralized financial management in the Ninth Circuit. After years of administrative delays and planning, the pilot Budget Decentralization Project began in FY87 in five locations across the country: the district courts, the bankruptcy courts, and the pretrial and probation services offices in the Northern District of California, the Western District of Washington, and the District of Arizona in the Ninth Circuit, and in courts in the Southern District of New York and the Second Circuit Court of Appeals.

The project completed its first year at the end of FY88. The initial learning year was spent working out mechanics, standardizing budget reporting procedures, and expanding the use of personal computers in financial administration. In spite of a slow learning curve, the pilot courts returned almost $4 million (over $2 million from the Ninth Circuit) to the Administrative Office at the end of the year, demonstrating a highly successful method of maximizing the use of scarce resources. The project has two more years to run and is continuously evaluated by the National Academy of Public Administration. It is anticipated that the final results of surveys and evaluations, along with the bottom line savings achieved, will lead to improved fiscal management throughout the federal judicial system.

2. Judicial Vacancies and Assignments

Congress has authorized 28 active positions for the U.S. Court of Appeals for the Ninth Circuit. The court has only briefly functioned at its full complement since the positions were granted in 1984. In mid-1989, the president appointed two judges to the court to fill vacancies that had been open for a total of over four years. One vacancy remains to be filled. In spite of the vacancies on the court, it has continued to increase the number of its terminations each year and has stayed on top of its caseload. The district courts have five vacancies ranging from one month to two and one-half years in duration. The longstanding vacancies in the District of Hawaii have been filled and the frequent intracircuit assignments to assist in the caseload there have been substantially reduced.

Intracircuit assignments continue to play an important role in adjudicative flexibility. At the Conference of Chief District Judges meetings, chief judges praise the timely and capable assistance they have received from colleagues in other districts during times of temporary caseload crisis. Intracircuit assignments are carefully monitored and are processed through the chief judge, with review by the Intracircuit Assignment Committee.

In recent years, the greatest call for extra judicial assistance has arisen in districts that, under a recent legislative proposal, would be separated from the Ninth Circuit to create a new Northwest circuit. In 1988, 42 individual assignments were made from districts in the proposed Ninth Circuit to districts in the proposed Northwest circuit. This temporary assistance and flexibility would be lost in any reconfiguration of the Ninth Circuit.

3. Juror Utilization

Efficient utilization of jurors at the district court level has been a goal of the judicial council for the past several years. The U.S. Judicial Conference and the judicial council have established a 30% NSSC rate (jurors not serving, selected, or challenged) as a target for jury utilization. Since focusing on the goal, the district courts have reduced their non-utilization rate from over 40% to just under the national average of 34% -- efforts are still underway to reach the target rate of 30%.

The District of Hawaii continues to post one of the best NSSC rates in the nation due to its innovative use of two magistrates to select all juries, and its pooling techniques to permit multiple jury selection and voir dire. The District of Nevada has introduced a one-day/one-trial system that has reduced its juror non-utilization rate by two-thirds and has increased juror satisfaction at the same time. Other districts are experimenting with different variations in an effort to reduce costs and save judicial and juror time and resources.

4. Surveying for Improvement

As part of the circuit's continuing efforts to improve performance, and as an outgrowth of the self-assessment and self-evaluation aspect of the annual judicial conference process, the courts have surveyed themselves and practitioners to obtain constructive criticism of court operations.

In 1985 and 1986, the circuit executive conducted extensive surveys of judges and practitioners in three areas: bankruptcy court management and administration; district court management and administration; and jurors' attitudes toward the judicial system. The results were generally positive and supportive of the performance of the courts, and contained valuable suggestions that were considered and acted upon by appropriate court committees.

In 1987, the circuit executive's office conducted a similar study of court of appeals practitioners' and district court judges' attitudes toward case management and administration by the court of appeals. The findings and recommendations were discussed at the 1987 judicial conference and the full court studied and implemented a half-dozen of the primary recommendations.

Two proposals for surveys emerged from discussions at the 1988 judicial conference. In connection with a conference resolution to encourage district courts to make greater use of magistrates, the Magistrates Advisory Committee designed and conducted a circuit-wide survey of the uses and perceptions of magistrates. Preliminary results will be presented to the 1989 judicial conference. Another conference resolution called for studies to improve the consistency of the law of the circuit. Professor Arthur Hellman, as part of his examination of the operations of the largest court of appeals, analyzed the work of the court of appeals from the point of view of consistency and presented his findings and conclusions at the 1989 conference. His basic conclusion was that perceptions vary greatly but that actual inconsistent decisions are rare.

Surveying has become an accepted and integral method of divining the will of the circuit and is used to assist decision-makers and policy-setting bodies to establish directions and goals. With advances in automation and greater electronic linking of the judges, this form of communication will prove even more effective in enhancing collegiality and preserving the sense of unity of the circuit.

5. Monitoring Cases Under Submission

Until 1985, all judicial officers reported their statistics on cases under submission to the Administrative Office in Washington, D.C. In July 1985 the U.S. Judicial Conference transferred this responsibility to the circuit executives. The Ninth Circuit Judicial Council welcomed this opportunity for improved information about caseloads and established a

Statistics Committee to monitor collection efforts and reports on cases under submission in the court of appeals, district courts, and bankruptcy courts.

Judges in the Ninth Circuit now report their statistics directly to the circuit executive who compiles and transmits them to the chief judges and the Administrative Office. The reports include district court cases three years or older, appellate cases under submission nine months or more, and further breakdowns to assist the chief judge in spotting and avoiding delays before they become serious.

The chief circuit judge and the Statistics Committee work with the appropriate chief district judge to lend assistance, provide caseload relief, or furnish temporary emergency law clerk assistance. At the court of appeals, much of this information is captured electronically through the NewAIMS docketing system, but in most other courts it is still obtained manually and requires considerable staff resources to collect. A long-term objective of the circuit is to obtain sufficient computer funding to automate this function to improve its accuracy and reduce the staff time needed to produce it.

6. Automation and Technology at the District Level

Ninth Circuit district and bankruptcy courts are testing new automation and technology to expedite case processing. The District of Arizona has a fully operational automated docketing system -- NewCIVIL -- developed by the Federal Judicial Center. It is also serving as a national training center for NewCIVIL; personnel from a half-dozen courts throughout the country received training in 1988-1989. Arizona is also a pilot test site for NewCRIMINAL, an integrated case management system for criminal cases that is expected to go into full operation in late 1989.

The District of Arizona also implemented the PACER system in early 1989 -- Public Access to Court Electronic Records allows personal computer owners to dial into the system and search through case and party information to retrieve any desired civil docket. Arizona will also be one of two national pilot sites for the first video court arraignment project. The project links a courtroom with the local detention facility via two-way closed-circuit television to allow magistrates to conduct off-site arraignments, initial appearances, and other pre-trial proceedings. This system is expected to be on-line in late 1989.

The bankruptcy courts of the Western District of Washington and the District of Oregon are among the first courts nationwide to employ BANCAP (Bankruptcy Court Automation Program) for fully automated docketing, noticing, and indexing. Bankruptcy courts especially benefit from advances in automation because of their high volume and rapid turnover of cases. These courts have also implemented a VCIS (Voice Case Information System) system that allows the general public to obtain case information from a touch-tone telephone. The system substantially increases the court's responsiveness to the public while reducing the staff time required to respond.

Other advances in technology being applied in the circuit include an experiment with video court reporting where testimony appears on a video screen as it is recorded by a court reporter. Another court has a fully integrated CAT (computer-assisted transcription) system that produces an almost simultaneous written transcript plus an immediate transcript display on terminals on the bench and at counsel tables. The court of appeals is developing a state-of-the-art dedicated audio conferencing facility in each of its three administrative unit headquarters to facilitate motions panel and other pre-hearing proceedings. The design of the facilities provides for future compatibility with video conferencing equipment.

The Ninth Circuit has been in the forefront in adopting new technology to improve the administration of justice, but the need for more and better computers and additional computer staffing continues to slow the improvements that are possible in this area. Far greater efficiencies will only be achieved with a renewed and increased level of financial commitment and support from the national level.

D. Alternative Dispute Resolution

Alternative dispute resolution (ADR) was the focus of the judicial council's annual action plan for several years and still attracts the attention of courts throughout the circuit. A Task Force on Alternative Dispute Resolution reviews nationwide efforts and encourages districts within the circuit that have not done so to consider implementing ADR programs to assist in processing case backlogs.

At the court of appeals, the court introduced an experimental appellate mediation program in Seattle in 1985. The circuit executive completed a thorough study of the project in 1987. It concluded that the project did not substantially contribute to settlements at the appellate level and recommended its discontinuance. Other recommendations from the study were implemented as part of the office of staff attorneys' prebriefing conference program and have materially aided in the early disposition of cases on appeal.

In the district courts, over half of the districts have considered and experimented with ADR in one form or another. The Northern District of California has incorporated a court-annexed arbitration program with substantial success. That court also runs a model Early Neutral Evaluation program in which cases are impartially evaluated by volunteer evaluators to encourage early settlement.

E. State-Federal Judicial Councils

Reactivation of state-federal judicial councils first appeared as an annual action plan item by the council in 1986. The primary purpose of the councils -- to foster cooperation and communication between the state and federal court systems -- has been substantially advanced.

Over the past several years, the councils have addressed a wide variety of issues, including:

- certification procedures for federal courts to obtain rulings from state courts on unsettled questions of state law in cases pending in federal court -- all but one state has now adopted formal certification statutes;
- resolution of calendar conflicts between courts -- most courts have adopted formal or informal policies for minimizing this problem;
- standardization of rules governing withdrawal of counsel from a case without proper notification;
- adoption of procedures to smoothly handle removal of cases from one court system to another;
- sharing information about technology and court-delay reducing mechanisms and projects; and
- examining issues relating to death penalty habeas corpus litigation that moves from the state court system into the federal courts.

The state-federal judicial councils provide a valuable communication link between the federal and state judicial systems and allow open and frank discussions and opportunities to resolve important issues in state-federal relations.

F. Bankruptcy Appellate Panels

The Bankruptcy Appellate Panel (BAP) is a unique Ninth Circuit institution and an unqualified success. Congress authorized each circuit's judicial council to establish a bankruptcy appellate court using bankruptcy judges as an alternative to district court review. The Ninth Circuit is the only circuit to embrace the procedure. The purpose is to provide consistent, expeditious review throughout the circuit. The Bankruptcy Appellate Panel has led to significant decreases in bankruptcy appeals filed in district courts and in appeals filed in the court of appeals.

Reestablished by the judicial council after the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984, the Bankruptcy Appellate Panel's jurisdiction was amended to provide that the parties are deemed to have consented to BAP jurisdiction unless they enter an objection within 21 days after filing the notice of appeal. If an objection is filed, the case is transferred to the appropriate district court. District judges in all districts of the Ninth Circuit have ordered the initial referral of all bankruptcy appeals to the Bankruptcy Appellate Panel.

The Bankruptcy Appellate Panel consists of seven experienced bankruptcy judges who volunteer their time to do appellate work. Panel members are chosen by the judicial council after a careful selection process. In 1988, the judicial council authorized up to a 25% reduction in regular bankruptcy caseload for those participating on the panel. All cases are heard by a three-judge panel, following briefing and hearing procedures similar to those of the court of appeals. Panel members do not sit on cases arising from the districts where they serve as bankruptcy judges. The BAP hears cases one week a month and attempts to hear cases in the districts from which they arose. The panel's slip opinions are provided to all Ninth Circuit libraries. Appeals from the BAP go directly to the court of appeals.

In each of the past three years, the BAP has received over 1,000 new filings. Objections have been filed to panel jurisdiction in an average of 30 - 35% of the cases. In 1988, the Federal Judicial Center conducted an in-depth review of the work of the Bankruptcy Appellate Panel to assess its progress and applicability to other circuits. The study, *Bankruptcy Appellate Panels: The Ninth Circuit Experience*, was published in 1989 and confirmed its success and replicability.

G. Preserving Our Heritage

Even as it plans for the future, the Ninth Circuit is intent on preserving a record of its past. Two projects are underway that address the past and the future in this circuit.

1. Ninth Judicial Circuit Historical Society

Incorporated in 1985 and inspired by the success of the Historical Society of the Northern District of California, the Ninth Judicial Circuit Historical Society is an independent, non-profit, educational, and public benefit organization dedicated to collecting, preserving, publishing, exhibiting, and otherwise promoting the history of the bench and bar of the Ninth Circuit.

With broad participation from judges and lawyers from every state in the circuit, and staffed by a professional historian, the society has quickly become the most productive and dynamic legal historical society in the nation. Its membership numbers more than 1,500 individuals, institutions, law firms, and corporations.

During the past three years the society has published three issues of its respected journal, *Western Legal History*. It has published one book, *Authorized by No Law*, and is working on another about western American courthouses with over 100 new and historical photographs. Using volunteer interviewers, the society has embarked on an ambitious oral history project, interviewing more than 30 judges and lawyers who have helped shape the courts and practice of law in the west. In 1989, the society began production of a series of historical displays that will travel to each of the courts in the circuit.

The Ninth Judicial Circuit Historical Society has contributed immeasurably to support the sense of community that binds the circuit together as a cohesive unit.

2. Western Justice Center

The judicial council has organized a Western Justice Center Foundation to explore the possibility of creating a Western Justice Center devoted to law reform, judicial administration, and associated research, development, and education to function in close relationship with the circuit library and occupy a site adjacent to the court building in Pasadena, CA.

The Western Justice Center will: (1) provide a place where groups dedicated to the improvement of the justice system may engage in research, development, education, and communication; (2) attract visiting scholars to engage in such research, teach at local schools, and interact with other researchers; and (3) house seminars and conferences and national and international meetings on the topic of improving the justice system.

Most of the organizations devoted to judicial administration originated and retain their headquarters in the east. Although they have worked cooperatively in some respects, for the most part each has pursued its own independent course. A western center for these groups promises to introduce an era of creative collaboration in an area of increasing importance to our society. It also promises to tap new resources west of the Mississippi to add strength to these important endeavors.

The Western Justice Center moved several steps closer to reality in the spring of 1989 when the foundation successfully completed negotiations to secure four bungalows adjacent to the Pasadena courthouse. The foundation will hold the lease to the property while a lawyers' committee -- the Founder's Circle for the Western Justice Center -- seeks private contributions to rehabilitate the historic buildings and to secure tenants.

Need For Additional Legislation

The Conference Report accompanying section 6 of the Omnibus Judgeship Act suggested that the Ninth Circuit report to Congress on its efforts to implement section 6, and on any need it perceives for additional legislation.

Congress acted swiftly to authorize the five additional court of appeals judgeships requested by the Ninth Circuit in its 1982 report. Those new judges will enable the court of appeals to remain current in handling its caseload for at least the next few years.

The 1984 report requested congressional assistance in authorizing additional positions in the circuit executive's office. The circuit received additional positions that helped it to reach the judicial administration goals set for the court of appeals and the other constituent courts of the Ninth Circuit.

In the 1986 report, the circuit cited the continuing need for additional staffing and automation, especially in the library and the clerk's office. With additional staff, the circuit would be better able to utilize automated technology and explore and implement further innovations. This additional staffing has not been obtained, however, and is urgently needed. The court renews its request for these staff positions.

The bankruptcy judges who serve on the Bankruptcy Appellate Panel panels, do so in addition to carrying a full or slightly reduced workload. To repeat the circuit's request from its last report, the Congress should take the additional workload into account when authorizing future bankruptcy judgeships and support staff in this circuit. With the fulfillment of these staffing requests, the Ninth Circuit perceives no further need for additional legislation at this time.

Conclusion

In 1982, the Ninth Circuit submitted its first report to Congress on its implementation of section 6 of the Omnibus Judgeship Act of 1978. That report described the steps the circuit initially took to explore the potential of innovative management in adjudication and administration in a large appellate circuit. The circuit noted that its early experience appeared promising.

In 1984, the circuit's second report cited its accomplishments and acknowledged the challenges still to be met. The prognosis was that the court was making good progress, but suggested a continuing period of experimentation.

In 1986, the circuit's third report concluded that the experiment was a success. With the innovations inspired by section 6, the courts in the Ninth Circuit could dispose of a huge caseload effectively without sacrificing the high quality of justice for which the circuit is known.

In 1989, the court can report that the innovations of the past decade provide a solid foundation for the continued growth of the Ninth Circuit. The circuit continues to refine the concepts it has developed over the past ten years with the hope that they may assist other circuits in confronting the challenges of a burgeoning federal caseload in the twenty-first century.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALFRED T. GOODWIN
Chief Judge

United States Courthouse
125 South Grand
P.O. Box 91510
Pasadena, California 91109-1510

OFFICE OF SENATOR HEFLIN
1990 APR -5 AM 10 05

April 2, 1990

Hon. Howell Heflin
United States Senate
Committee on the Judiciary
Washington, D. C. 20510-6275

Dear Senator Heflin:

Thank you for affording me the opportunity to answer supplemental questions from members of your subcommittee.

Senator Thurmond asked about geographical balance and California domination. Senator Grassley asked about how big is too big, and should we have a pilot program or a study of certiorari at the circuit level.

I will take up Senator Thurmond's questions first.

(1) The question of geographical balance is a cogent and important question. I have asked it of myself a number of times. After 15 years as an Oregon State judge, trial and appellate, and two years as a U. S. District Judge in the District of Oregon, and 18 years as a judge of the U. S. Court of Appeals, I believe that geographical considerations are much more important in the trial court than they are in the federal appeals court. In the trial court a judge participates in the fact finding process, even when there is a jury. The judge decides whether or not there will be a view of premises, and how it will be conducted. The judge decides in non-jury cases all questions of fact. Knowledge of the economy and the geography of a particular area can be important in evaluating the materiality and credibility of opinions and assertions made about facts. At the Court of Appeals level the facts are supposed to have been decided by the trial court and the appellate court is supposed to be applying federal law. At that stage of the litigation hometown wisdom and local folklore probably are counterproductive rather than helpful. Federal law should be applied evenly across the board, without regard to state lines. I believe these principles apply equally in energy, environmental, commercial, maritime, bankruptcy, and criminal law.

(2) As has Senator Thurmond, I have heard expressions of concern about California interests dominating the Ninth Circuit. California is actually under-represented on the Court of Appeals and I have seen no evidence that California interests have anything to do with the application of federal law in the cases coming before our court. California is the dominant banking and commercial center for the West Coast. California has major ports which accommodate much of the international trade of the United States. California exports entertainment products which, for better or for worse, influence the whole world. Yet I see no evidence that judges from Sacramento, San Francisco, Los Angeles, San Diego and other California post offices dominate our court. For 17 years our chief judge was from Arizona. For the next 12 years our chief judge was from Montana. I happen to be from Oregon. If there is California domination I am afraid Diogenes and his lantern will have to find it.

(3) Senator Grassley's first question is a good question that is frequently asked. I confess that I have no good answer. I believe the State of California has approximately 70 judges in its state appellate system. I hope we never get that big, but if we do, I hope we are able to deal with the cases. The geographic circuits began in their present form about midway in the history of this republic. One hundred years ago, when the states making up the present Ninth Circuit were placed in this circuit, the boundaries of the eastern circuits had been fairly well established by the distances people could travel conveniently by steam cars and horse-drawn vehicles. The West was exceptional. It still is. We now have jet airplanes, fax transmission, electronic mail and efficient telephones. We spend much less time traveling than we did as recently as 30 years ago. I believe that three-judge panels properly administered can continue to handle a fairly heavy caseload. I would recommend that we wait for the Federal Courts Study Committee to complete its work and then experiment with some of its proposals for case management before we break up the large circuits. Breaking up the large circuits inevitably will produce more inter-circuit conflict, which the Supreme Court will then have to deal with.

The second question Senator Grassley asked was equally cogent -- certiorari at the Court of Appeals level. Something like this is now happening in some form under other names. Some courts engage in screening; some courts have summary calendars. Certiorari on the model of the Supreme Court permits a minority of the court to accept a case for decision. In a large court of appeals any type of certiorari would have to be administered either by panels or departments, or by staff reporting to judges. It will require some study to work out a suitable model. I believe some of the experts in the field are now studying the subject, and perhaps the Federal Courts Study Committee will come forward with a proposal. In our court, for example, about 6,000 cases are filed each year. About half of these cases fall by the wayside as counsel and the parties abandon or neglect the appeals. Of the other half that survive dismissal for lack of prosecution, etc., about two-thirds are disposed of by unpublished memoranda. Some number of these memorandum cases probably could be disposed of by summary denial of the appeal on the ground that no substantial federal question is presented. The bar of this circuit is firmly attached to the concept of an appeal as a matter of right and to oral argument and a reasoned written decision. Any model incorporating discretionary appeal should be carefully studied first by the bar and the judicial committees of the congress. Speaking for myself only, and in no way for my colleagues, I would personally have no objection to further examination of the subject. I must admit, however, that I have serious misgivings about any major movement to convert to broadly discretionary appeals from the federal trial courts and agencies. I trust the wisdom of the bar in these matters.

I hope I have fully answered your questions. I stand ready to respond further should further questions arise. I appreciate very much the courtesy that your subcommittee extended to me on March 6, 1990, and will follow with interest further developments as your committee examines S. 948 and other pending legislation affecting the courts.

Sincerely,

Alfred T Goodwin

Alfred T. Goodwin
Chief Judge

SLADE GORTON
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WASHINGTON, DC 20510

COMMITTEES
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INDIAN AFFAIRS

1990 APR 26 AM 10:26

April 24, 1990

The Honorable Howell Heflin
Committee on the Judiciary
728 Hart
Inside Mail

Dear Howell:

I have received a copy of Judge Goodwin's response to questions from two other Senators submitted after the hearing on the division of the Ninth Circuit was concluded. In a very important sense they do not plow any new ground, but a brief response is nevertheless in order.

Fourteen of the twenty-eight judges on the Ninth Circuit were appointed from California and others, like the three Chief Judges mentioned in Judge Goodwin's letter, have long since moved there and become Californians in all but name. Nevertheless, it is true that fourteen out of twenty-eight does actually under-represent California, a state so large that it produces more litigation than eight states and other territories combined. That's just the point. The Northwest will always be dominated by California even if we have a slightly favorable disproportionate share of the judges on the court, and a large number of cases arising in Washington or Oregon or other Northwest states will be decided exclusively by Californians. Judge Goodwin's boasting of the influence of California in the world simply proves my point.

Moreover, in his answer to Senator Grassley's question, he expresses his obvious view that there should be no division no matter how large the number of judges on the court becomes. I am sure that you join me in regarding that as simply both inequitable and insupportable.

Sincerely,

Slade Gorton
United States Senator

SG:ja
cc: Chuck Grassley
Strom Thurmond

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Senator HEFLIN. Our next panel is composed of the Honorable Owen M. Panner, chief judge, U.S. District Court for the District of Oregon; the Honorable Barbara J. Rothstein, chief judge of the U.S. District Court for the Western District of Washington; and the Honorable Thomas E. Carlson, U.S. bankruptcy judge, northern district of California.

Judge Panner, we would be delighted to hear from you.

Judge PANNER. I would like to yield my time first to Judge Rothstein. We are each chief judges. She has to catch a plane at 5 in Maryland and mine is National. Both of us have criminal trials tomorrow, so if I may, I would like to let her proceed.

PANEL CONSISTING OF HON. BARBARA J. ROTHSTEIN, CHIEF JUDGE, U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SEATTLE, WA; HON. OWEN M. PANNER, CHIEF JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF OREGON; AND HON. THOMAS E. CARLSON, U.S. BANKRUPTCY JUDGE, NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO, CA

STATEMENT OF HON. BARBARA J. ROTHSTEIN

Judge ROTHSTEIN. If that is all right with you, Senator, I appreciate it.

I am Barbara Rothstein and I am chief judge of the western district of Washington, and I thank you for the invitation to appear before the subcommittee. You will be hearing from a number of people opposing the proposal to split the ninth circuit and about the advantages of keeping the circuit intact.

I am going to focus my comments primarily on my experience as a district judge, and give you the views of a district judge on why I think the ninth circuit should stay intact, and particularly as a chief judge sitting in Seattle, WA.

During the 10 years that I have been sitting on the bench, the legal profession has undergone some dramatic changes. And having watched the ninth circuit function and adapt to these events, I am convinced that it would be inappropriate to split the circuit.

The ninth circuit has turned size to its advantage. When I was first appointed to the bench, our district court was desperately in need of judges. Each judge was handling a staggering caseload, and to cope with this situation we drew heavily on the circuit's ability to assign us judges from other districts.

These judges helped us out even on very short notice with emergency matters and with extended trials. And, thankfully,. these transfers from one district to our district were accomplished through simple, expedited procedures.

Today, the situation is reversed. There are other districts throughout the circuit that are struggling under great caseloads and are in dire straits. We, on the other hand, have our full complement of judges and we have been able to respond to the need of these other districts by presently providing emergency assistance to California and to Arizona. This pooling of resources would be severely hampered by reorganizing the ninth circuit.

The administrative mechanisms for transferring judges between circuits rather than within a circuit are cumbersome, time consuming, and expensive. That movement between circuits must be reviewed by a centralized committee, must be approved by the Chief Justice, and requires extensive lead time. And that lead time is just not available in a practical court setting.

The efficiency and speed with which the circuit has handled this problem is only one example of the way it has handled the needs of the district courts. It has done a splendid job in meeting our problems.

The second point I would make is that any setting up, any creating of a new administrative headquarters in a new circuit is bound to be exorbitant. It involves courthouse space, a new library, computerized systems, centers for filing and docketing, and an entire new administrative staff, and that includes staff attorneys.

A lot of these points have been brought out already, but this is coming at a time when the Federal district courts are crying out for new equipment and new personnel to meet the increased caseloads that they are encountering now, especially under the new criminal Acts that are creating new cases for the courts all the time.

And all of this creation would be for a circuit that, in terms of caseload, would be the smallest circuit in the country. That new circuit would have none of the economies of scale, none of the administrative expertise, and none of the diversity of the present ninth circuit.

Last, and perhaps most significantly, any decision to split the ninth circuit runs counter to the current trend in the legal profession. What we are seeing around us is a trend to having law practiced on a broader and broader regional basis.

We on the west coast are faced with an increasing number of legal matters impacting the region as a whole, and what we see is that law firms all around us are consolidating so as to deal more effectively with matters affecting the Pacific rim.

We now have most of our large law firms having offices throughout the region. And as we are presently constituted, we can react with an integrated body of law for the Western States. Splitting the circuit would only serve to fragment that body of law.

The people of this country are looking to the Federal courts to provide a uniform and predictable Federal law. Our Supreme Court is already facing a herculean task in resolving circuit conflicts. Breaking down the ninth circuit can only make that task more difficult.

I thank you for the chance to express these views.

Senator **Heflin**. Thank you. You can be excused and you won't be held in contempt of court. [Laughter.]

Judge **Rothstein**. Thank you.

[The prepared statement of Judge Rothstein and answers to written questions follow:]

STATEMENT BEFORE THE SENATE JUDICIARY COMMITTED ON S. 948

March 6, 1990

Barbara J. Rothstein, Chief Judge
United States District Court for the
Western District of Washington

Thank you for the invitation to appear before the subcommittee. Because the subcommittee has had the benefit of hearing from many other persons regarding the current operation of the Ninth Circuit and the advantages of keeping the circuit intact, my comments will focus primarily on my experiences as a district judge, more particularly, as a chief judge sitting in Seattle, Washington. During the ten years since I have been appointed to the bench, the legal profession has undergone some dramatic changes. Having seen the Ninth Circuit function and adapt to these events, I am convinced that it would be improvident to split the circuit.

First, when I was appointed to the bench, our district court was desperately in need of judges; each judge was handling a staggering caseload. To cope with this situation, our court drew heavily on the circuit's ability to temporarily assign judges to hear matters in our district. Even on short notice, we received help for extended trials and emergency matters. Thankfully, these transfers were accomplished through simple, expedited procedures. Today, our court is operating at full capacity; however, other districts in the Ninth Circuit are in dire straits. In response to this need, judges in the Western District of Washington are presently providing emergency assistance to courts in California and Arizona. This "sharing of resources" would be severely hampered by the proposed reorganization of the Ninth Circuit. The administrative mechanism for transferring judges between circuits is cumbersome and time-consuming. Such moves must be reviewed by a central committee, and then approved by the Chief

Justice, a method requiring tremendous lead time--and lead time is not available in any practical court calendar setting.

The efficiency and speed with which the circuit has handled this difficult problem is only one example of its many successes. The Ninth Circuit is presently doing a splendid job handling the problems and needs of the district courts.

Second, the cost of creating the administrative headquarters for a new circuit is certain to be exorbitant. Courthouse space, centers for filing and docketing, expensive computer equipment, complete library facilities, and an entirely new administrative staff complete with attorneys will all require increased costs at a time when the federal courts are already crying out for equipment and personnel to meet increasing caseloads and the need to modernize. All of this would be for a new circuit which would, in terms of caseload, be the smallest circuit in the country. It would have none of the economies of scale, none of the administrative expertise, and none of the diversity of the present Ninth Circuit.

Third, and perhaps most significantly, any decision to split the Ninth Circuit runs counter to the legal profession's current trend toward practicing law on a broad regional basis. We, on the West Coast, are facing an increasing number of legal matters impacting the Western region as a whole. Law firms are consolidating so as to deal more effectively with matters affecting the Pacific Rim. As presently constituted, the Ninth Circuit has developed an integrated body of law for the western states. Splitting the circuit would only serve to fragment that body of law.

The people of this country look to the federal courts to provide uniform and predictable law. Our Supreme Court, the ultimate arbiter of conflicts between existing circuits, is already facing a herculean task. Breaking down the Ninth Circuit can only make the task of providing this uniform federal law more difficult.

Thank you for the opportunity to express these views.

United States District Court
Western District of Washington
United States Courthouse
Seattle, Washington 98104-1187

Barbara J. Rothstein
Chief Judge

April 24, 1990

Hon. Howell Heflin
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Dear Senator Heflin:

I am pleased at this time to be able to furnish responses to the additional questions posed by you and Senator Thurmond. Turning first to your questions:

(1) The first question asks how often districts in the Ninth Circuit provide emergency assistance to one another. At present, the need for emergency assistance between districts is constant and ongoing. There are always judges being assigned to other districts -- often as many as two or three at a given time serving in districts other than their own. The Chief Judge of the circuit spends considerable time daily locating judges and assigning them to needy districts. Fortunately, his familiarity with the districts within the circuit and with those judges who are willing and able to travel on short notice makes this task manageable. The reason for this need is that in many districts within the circuit, the criminal caseload is such that the courts are completely overloaded with drug-related cases. The number of cases being brought continues to increase while the number of pleas continues to decrease. The result is that more cases are requiring trials. The cases are more complex -- often involving multiple defendants -- and lengthy.

(2) The second question inquires as to what types of legal matters impact the West Coast region as a whole and the degree of such impact. Many of our recurrent and complex issues are regional by their very nature. For example, cases centering on environmental concerns, such as river development or the protection of wilderness areas, often necessarily involve several states. Cases that concern allocation of regional resources, such as Northwest water supplies to California or fish schools with specific migration patterns along the coast, often require court decrees that address the need for uniformity and equity for all users of the resource. Offshore drilling poses issues that need to be resolved on a broad regional basis so that there can be predictability for those whose plans and investments involve vast sums of money. Illegal immigration is another problem area

that effects all of the Western states. It is an area where uniformity in the law is extremely difficult to achieve and having circuit-wide precedents is important. The West Coast states are all actively developing and increasing trade with the Pacific Rim nations thus creating great need for uniform maritime and contract law.

These are key areas that are before the courts with increasing frequency and their impact on the courts in this circuit is great indeed.

Turning to the questions raised by Senator Thurmond:

(1) In my opinion there are few, if any, geographical burdens that exist under the Ninth Circuit's current configuration. The appellate court judges who travel frequently do not believe that creating a Twelfth Circuit will substantially reduce their travel time. Given the distances which one faces on the West Coast, the bulk of the time is spent in the airport and on the ground. The actual travel time would not vary substantially.

(2) The second question asks whether S. 948 would require inter-circuit transfers of judges, and what such a transfer involves. This bill would indeed require inter-circuit transfers. Before an active judge may sit in a circuit other than his or her own, a request must be submitted to the Inter-circuit Assignment Committee as well as to the Chief Judges of the two circuits involved. The Inter-Circuit Assignment Committee is appointed by the Chief Justice of the United States Supreme Court, and is currently chaired by Judge Flannery of the District of Columbia District Court. The Assignment Committee and the two Chief Judges determine whether the two involved circuits are either "borrowing" or "lending" circuits. (A circuit that is currently lending judges to other circuits cannot simultaneously request to borrow another judge.) Once all three approvals are received, the transfer may take place.

It should be clear that the inter-circuit procedure is far more cumbersome than the intra-circuit one. The inter-circuit procedure is far too convoluted and time consuming to provide meaningful relief in an emergency scheduling situation.

I hope my responses to your questions are helpful. If you should have any further questions, I would be pleased to address them.

Sincerely,

Barbara J Rothstein

Barbara J. Rothstein

BJR:lgj

Senator **Heflin**. We will now have Judge Panner.

STATEMENT OF HON. OWEN M. PANNER

Judge **Panner**. Mr. Chairman, thank you very much for the opportunity to be here. I have submitted a written statement that I would ask be made a part of the record.

I am here representing the active judges in Oregon. We feel the circuit is too big and it should be split. When we were asked for our opinion, I must say that I admired the judges, even though one of them said he didn't particularly want to be a part of the icebox circuit as far as travel and meetings go. All of our judges felt that from the standpoint of the prompt and effective administration of justice, the circuit should be split.

We have 2,800 opinions on the merits issued annually by the ninth circuit. I calculated that to be about 14 opinions per working day that each of us gets on our desk. It has long been recognized that trial judges really need to keep up on a daily basis, as Judge Clark has said to this committee before, with the law of the circuit. I don't know a single district judge, nor a single circuit judge who even contends that they read all of the decisions of the ninth circuit that are now being issued.

At a recent poll, 68 percent of the district judges disagreed with the statement that there is consistency between the panels on the same issue. I think it is an old joke said somewhat with tongue in cheek, but with a lot of truth to it, that if we trial judges knew which panel was going to be assigned to our case, we could meet the requirements of that panel a little bit better.

This is no criticism of our judges in the circuit. Judge Goodwin and Judge Browning have done a masterful job, even though it is impossible, administering this massive circuit. With some 9,000 daily judge activities on panels in a year, it is impossible to maintain consistency.

The statistics tell a story that is very effective, also. As of the end of June 1989, which was the last full year of statistics and before the earthquake in San Francisco, the average time of circuits in the United States was 10.3 months from the notice of appeal to disposition. The average time in the ninth circuit was 15.3 months. That is 5 months. That is only 2 months longer than our total time in trial courts average from filing to disposition.

It is too long, and that in the face of the fact that the volume on a panel basis in the ninth circuit is ninth among all of the 11 circuits. In other words, the volume is lower, the time is longer, in spite of capable judges and heroic efforts with the best possible administration.

So you can put this any way you want to. I certainly agree with Senator Wilson that this is not a political or a gerrymandering decision. That is not why we voted for it. It is not a personal decision. We like to go to conferences in California and Arizona and sit on panels, as district judges do, and we like to travel around the circuit just like everybody else.

But I submit to you that the circuit is too big and that the future is going to make it even bigger. And I doubt seriously that the Supreme Court would feel that it would take any more time to decide cases between two circuits than they have in the past over the ninth circuit decisions.

Thank you.

[The prepared statement of Judge Panner and answers to written questions follow:]

STATEMENT TO THE SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE FOR CHIEF JUDGE OWEN M. PANNER

MARCH 6, 1990

RE: S. 948

Mr. Chairman, I want to thank you for the opportunity to appear before the Committee in connection with this proposed legislation to divide the Ninth Circuit. You've had all kinds of statistics in connection with this matter. I will try to bring to you the practical problems of a trial judge from Oregon.

Last year when Senator Hatfield asked me to poll our district court judges, all 5 of the active district judges in Oregon favored a split of the circuit. Our senior judge felt that it should not be split. The active judges felt strongly about their position and presented this view to Senator Hatfield. We recognize that former Chief Judge Browning and our present Chief Judge Goodwin have administered the circuit with outstanding ability, effort and ingenuity. They have worked capably and diligently against impossible odds. They have been fair to all judges, both circuit and district. District judges have equal representation on the circuit council and generous representation on all committees of the circuit. We in Oregon have nothing but the highest respect for their ability and industry. We must say we question their judgment in wanting to keep the circuit together.

We recognize the intensity of feelings that most of the circuit judges have developed over this issue and we trust that our close friendships will remain when the dust settles on this issue.

We still consider Judge Goodwin at least a "former" Oregonian and will continue to invite him to come to Oregon for a branding now and then. I must observe, however, that he seems to have lost some of his ability with a lariat since undertaking the additional and nearly impossible chores of chief judge of a circuit of this size. Friendship aside, the circuit is far too big. It is much bigger than it was when the fifth circuit split. All of the arguments that were made then in favor of splitting are even more persuasive now.

There are specific problems that result solely from the size of the circuit. We have 28 circuit judges. In addition, we have 11 senior circuit judges, 87 district judges, and 40 senior district judges, most of whom assist from time to time. Last year, there were 9310 judge participations in panels. The number of opinions on the merits issued was 2,794. It is becoming more and more difficult for district judges to take time away from their trials to assist. In spite of this the circuit's caseload is growing rapidly, and there is no end in sight.

Argument has been made that volume will not change by splitting the circuit. I disagree. The size of the Ninth Circuit encourages discretionary justice rather than error correction. We have so much law in the Ninth Circuit that it has become increasingly easy for appellate panels to pick out those decisions that bring about the results desired by the panel. Philosophical viewpoints become more and more important. The uncertainty of result increases appeals. To an extent this is true throughout the country but it is even more pronounced in the Ninth Circuit

The present size of the circuit, the travel time of judges and the expense of travel can't be justified. In an admirable effort to objectively and fairly assign cases, district and circuit judges are traveling all over the circuit.

There are circuit-wide committees meeting regularly throughout the circuit. Our annual conference brings judges and delegates from substantial distances. Last year 219 Article III judges, magistrates, and bankruptcy judges, attended our conference. We had 85 lawyer delegates, many of whom attended from long distances. Not only is substantial time and expense involved, but the conference has become so big that it is extremely difficult to carry out the statutory purpose.

We have serious conflicts in circuit law because of the number of three-judge panels that are necessary. Recognizing that there was a study done that concluded to the contrary, the fact is that not all of the conflicts are apparent. More than one district judge has facetiously suggested that we should know who the panel is going to be before we make a decision so that we wouldn't be reversed so often.

Trial judges should read every decision of the Supreme Court and of their circuit. Computers are wonderful but they are not much help while a witness is on the stand and a ruling is required. Daily knowledge of the law of the circuit is a necessity. This has become impossible, with an average of over 12 opinions landing on our desks each working day. More and more appellate courts are establishing standards and guidelines for trial judges to follow. These standards and guidelines are constantly shifting and changing. It is critical that we read the circuit decisions. Shouldn't circuit judges as well as trial judges read the decisions of their own circuit? In the Ninth Circuit it has become accepted that this is impossible.

Many of the panels are reviewing factual determinations made by the trial courts encouraged by the trend toward appellate decision-making rather than error correction. The standards of review are reanalyzed regularly. At last count there were 4 different standards of review and hundreds of classifications for our circuit to apply. They increase constantly.

Chairman Biden has just introduced legislation which proposes to expedite decisions in the district courts. While there will be great controversy over the proposed legislation, I think most everyone would agree that litigation is too slow and too expensive and that changes must occur. Senator Biden's bill does not address the delay at the circuit level which in the Ninth Circuit is more serious than in the trial courts. The median time from filing of the notice of appeal to disposition was 15.3 months for the period ending June 30, 1989. This is the longest of all of the circuits and is increasing each year.

The number of pending appeals continues to rise annually in spite of the Herculean efforts of judges. The number of terminations per panel does not compare favorably with the other circuits, even considering the effort that is being expended.

The argument has been made that increasing the number of circuits will increase the work of the already overloaded Supreme Court. I suggest it is difficult to determine whether there would be more appeals from the two proposed circuits than there are now from the existing circuit. Certainly, the Supreme Court has had to devote extensive time to the Ninth Circuit.

As long as we have three-judge panels functioning throughout the country, the number of appeals will continue to increase rapidly. Ultimately, the only real answer is to give the Circuit certiorari and increase the size of the panels so as to get more deliberate, thoughtful and fewer decisions. In the meanwhile, however, the Ninth Circuit should be split.

While division as provided in S. 948 would not solve all the problems of the judiciary, it would make justice in the two circuits more consistent, more expeditious and less expensive.

I appreciate the opportunity to appear before the Committee.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
UNITED STATES COURTHOUSE
PORTLAND, OREGON 97205

CHAMBERS OF
OWEN M. PANNER, CHIEF JUDGE

U.S. Senate Judiciary
Subcommittee on Courts &
Administrative Practice
223 Hart SOB
Washington, D.C. 20510

Attention: Monique Abacherli

Re: S. 948

Thank you for your inquiry concerning this proposed legislation. My answers to the questions follow.

QUESTIONS SUBMITTED BY SENATOR HEFLIN

QUESTION:

YOU STATED THAT THE ACTIVE DISTRICT JUDGES IN OREGON FAVOR A SPLIT. TO WHAT EXTENT IS THIS OPINION SHARED BY DISTRICT JUDGES IN OTHER NINTH CIRCUIT STATES?

ANSWER:

It is my belief that the majority of the active district judges in other Ninth Circuit states oppose splitting the circuit.

QUESTION:

YOU MENTIONED THAT LAST YEAR THE CIRCUIT SAW 9310 JUDGE PARTICIPATION IN PANELS. HOW OFTEN DOES THE AVERAGE NON-SENIOR JUDGE PARTICIPATE IN PANELS?

ANSWER:

Of the total of 9310 participants, 7811 were by resident active circuit judges. 1.071 participations were by resident senior circuit judges. 428 participations were by visiting judges which included active and senior district judges. I do not have the breakdown of that 428. If you want a further breakdown, I can either obtain it from the Circuit, or the Circuit may be able to give it to you.

QUESTIONS SUBMITTED BY SENATOR GRASSLEY

QUESTION:

1. **TO WHAT EXTENT DO YOU THANK THAT LAWYERS OPPOSITION TO S. 948 IS DUE TO THE FACT THAT LAWYERS LIKE INTRA-CIRCUIT CONFLICTS, BECAUSE IT ALLOWS THEM HOPE THAT THEIR LEGAL ARGUMENTS MAY PREVAIL IF THEY ARE LUCK ENOUGH TO GET A "FAVORABLE" PANEL ?**

    a. Aren't lawyers paid to make conflicts, to draw distinctions between their case and the settled law of the circuit?

    b. As the number of appellate judges increases, that leads to more litigation, doesn't it? [because the law necessarily becomes less settled].

    c. Isn't more litigation good for lawyers?

ANSWER:

1a. I believe that some lawyers may like intra-circuit conflicts because it does create additional legal work by increasing the opportunities to obtain a reversal. However, I believe that the principal lawyer's opposition to S. 948 is due to the fact that there has been a heavy lobbying effort by Ninth Circuit judges to retain the Circuit intact. There has been no presentation to the lawyers of the Circuit about the problems connected with the size of the Circuit.

There are very few lawyers who practice consistently before the Circuit. Judge Browning, Judge Goodwin and other circuit judges, in an honest belief that the Circuit should remain intact, have presented arguments on a consistent basis for many years, not only to the judges of the Circuit but also to the lawyer groups within the Circuit.

1b. Yes. This is definitely true.

1c. While some lawyers may think so, I do not believe, in the long run, it is good for the majority of lawyers, or for the profession generally. It is certainly not good for the clients.

QUESTION:

2. IT'S BEEN CLAIMED THAT ABOUT 60 PERCENT OF THE 9TH CIRCUIT'S OPINIONS ARE UNPUBLISHED, AND IT'S SUGGESTED THAT A REASON IS TO TRY TO 'HIDE' INTRA-CIRCUIT CONFLICTS. DO YOU AGREE? IF SO, HOW IS THIS GOOD FOR OUR LONG TRADITIONS OF EQUAL JUSTICE?

ANSWER:

2. I do not believe that the Circuit's intent is to "hide" intra-circuit conflicts. I think it is an attempt to reduce the number of opinions that must be read and cited by lawyers and judges. Unpublished opinions do create confusion. While they cannot be cited, it is difficult for judges and lawyers to decide that they should be ignored. There are definitely far too many opinions in the Ninth Circuit, both published and unpublished. As you indicated in question number 1, you can find an opinion or dicta to justify almost any position. As I indicated in my written statement, I think this leads to decision-making by the Circuit, rather than error correction.

QUESTIONS FOR PANEL II

QUESTION:

1. JUDGE PANNER, UNDER EXISTING REGULATIONS IT IS NOT DIFFICULT TO ASSIGN A JUDGE TO SIT TEMPORARILY IN ANOTHER DISTRICT WITHIN THE SAME CIRCUIT. I BELIEVE THIS APPROACH IS USED FREQUENTLY IN THE NINTH CIRCUIT. HOWEVER, IT IS MORE DIFFICULT TO ASSIGN A JUDGE TO SIT IN ANOTHER CIRCUIT. THEREFORE, BY DIVIDING THE CIRCUIT, WOULDN'T THAT LIMIT THE OPTIONS AVAILABLE FOR SHIFTING JUDICIAL RESOURCES TO HANDLE EMERGENCY MATTERS OR EXTENDED TRIALS?

ANSWER:

1. Yes, the options would be limited to some extent. However, both Circuits would still remain large enough to allow more flexibility than exists in most other circuits.

QUESTION:

2. THIS QUESTION IS FOR JUDGE PANNER AND JUDGE ROTHSTEIN. COULD YOU SPEAK TO THE GEOGRAPHICAL BURDENS THAT EXIST UNDER THE CURRENT CONFIGURATION OF THE NINTH CIRCUIT? HOW WOULD CREATING A TWELFTH CIRCUIT ALLEVIATE THESE PROBLEMS?

ANSWER:

2. With the size of our Circuit, travel distances are very substantial. Dividing the Circuit would reduce those travel distances substantially. Circuit judges would be located where they are hearing arguments for the most part. District judges assisting other districts and sitting on the Circuit would be much closer when travel was necessary.

If any further information is needed, I will be happy to submit it.

Very truly yours,

Owen M Panner

Owen M. Panner
Chief Judge

OMP/mh

cc: Honorable Mark O. Hatfield (w/enc.)

Senator HEFLIN. Thank you, sir. We appreciate your testimony. Judge Carlson, we are delighted to hear from you.

STATEMENT OF HON. THOMAS E. CARLSON

Judge CARLSON. Thank you, Mr. Chairman. My name is Tom Carlson. I am a bankruptcy judge from the northern district of California, and I appreciate the opportunity to be here today to speak on behalf of the bankruptcy judges of the ninth circuit.

I believe that the division of the ninth circuit would undermine the administration of the bankruptcy laws in three different ways. The first effect that the division of the ninth circuit would have would be to undermine the work of the bankruptcy appellate panel.

As I am sure you know, a bankruptcy appellate panel is a group of bankruptcy judges sitting in three-judge panels who review trial court decisions from the bankruptcy courts. In circuits in which a bankruptcy appellate panel has not been established, the district courts review bankruptcy court decisions.

Bankruptcy appellate panels provide three major benefits. The first is the quality of their decisions. A recent study that was performed by the Federal Judicial Center interviewed attorneys who have practiced before the bankruptcy appellate panel. Two-thirds of the attorneys responding stated that they believed that the opinions of the BAP were more soundly reasoned and more likely to be correct than district court decisions.

This is not due to any lack of ability or effort on behalf of the district court, but rather from the fact that the district courts have so many other types of law that they have to keep up with and they hear so few bankruptcy appeals each year that they are simply unable to develop a similar level of expertise.

The second benefit of the bankruptcy appellate panel is that it is a single, 7-judge court that provides uniform interpretation of the bankruptcy laws for all the 13 districts of the ninth circuit. Its decisions are respected as binding precedents by all the bankruptcy judges of the circuit.

The plight of district judges hearing bankruptcy appeals is very, very different. There are 84 active district judges who hear bankruptcy appeals sitting alone. In essence, these constitute 84 separate appellate courts. They are unable to provide any uniform interpretation of the law, and their decisions are not accepted as binding precedents through all the districts of the circuit.

The third benefit of the bankruptcy appellate panel is to reduce the workload of the article III courts. Every case decided by a bankruptcy appellate panel need not be decided by the district court. The BAP's also reduce the workload of the court of appeals.

Again, the recent study of the Federal Judicial Center noted that further appeals are taken much less frequently from BAP decisions than from district court decisions, and the Federal Judicial Center estimated that this factor alone reduced the number of cases taken to the court of appeals by 135 cases per year.

The benefits of the bankruptcy appellate panels are now becoming well recognized. The tentative draft of the report of the Federal

Courts Study Committee recommends that all circuits establish bankruptcy appellate panels.

The division of the ninth circuit would undermine the benefits of the BAP's in two ways. First of all, there would no longer be a single bankruptcy appellate panel providing uniform decisions for all 13 districts of the circuit. There would be at least two such panels.

Second, it is difficult to maintain a bankruptcy appellate panel in a circuit with a small number of judges. This is complex to explain, and I have explained so more fully in my written remarks.

The second reason that I think dividing the circuit would be bad for the bankruptcy courts is that the ninth circuit has provided extraordinary leadership over the last dozen years. The ninth circuit has basically created bankruptcy appellate panels. The ninth circuit drafted the emergency rule that governed the courts after *Marathon*.

More important, the ninth circuit has taken extraordinary steps to integrate bankruptcy judges more fully into the judicial family. There are bankruptcy judges participating on the circuit council. Bankruptcy judges participate fully in all the activities of the annual conference. Bankruptcy judges are members of all the committees of the circuit council. I cannot overemphasize to you how important it is to the morale and the efficiency of the operation of the bankruptcy courts to keep this leadership team together.

I see that my time has run out. Thank you very much.

[The prepared statement of Judge Carlson and answers to written questions follow:]

STATEMENT BEFORE THE SENATE JUDICIARY COMMITTEE
ON S. 948
MARCH 6, 1990

THOMAS E. CARLSON
UNITED STATES BANKRUPTCY JUDGE
NORTHERN DISTRICT OF CALIFORNIA

Thank you for inviting me to appear before the subcommittee.

I am here to describe how division of the Ninth Circuit would affect the administration of the bankruptcy laws. I believe that dividing the Ninth Circuit would substantially undermine the efficiency of the bankruptcy courts, the morale of bankruptcy judges, and the goal of uniform application of the bankruptcy laws. While I have not conducted a scientific survey of all the bankruptcy judges in the Ninth Circuit, every judge I have talked to has expressed similar opinions.

The first major effect of dividing the Ninth Circuit would be to limit options for shifting judges between districts to provide relief for districts with heavy caseloads. Under existing regulations, it is very easy to assign a judge to sit temporarily in another district within the same circuit. It is very difficult, however, to assign a judge to sit in another circuit. Thus, dividing the circuit would limit the options for shifting judicial resources to handle vacancies, illnesses, or temporary workload increases.

The ability to shift resources between districts is a need bankruptcy courts share with the district courts. The need to shift resources is probably more acute in the bankruptcy courts, however, because there are sharper fluctuations in bankruptcy filings. This is so because the number of bankruptcy filings is affected not only by those factors that influence the amount of litigation generally, but also by the state of the economy in the district. Bankruptcy filings rise sharply during economic downturns. Furthermore, changes in filings differ widely from one district to another, because not all districts suffer each downturn to the same extent or at the same time. Statistical reports prepared by the Administrative Office of the United States Courts support the conclusion that bankruptcy filings fluctuate more sharply than district court filings. Over a recent four-year period, total district court filings increased or decreased annually in a given district by an average of 8.7 percent. During the same period, bankruptcy petitions increased or decreased annually in a given district by an average of 18.6 percent, or almost three times as much. The same data also support the conclusion that temporary reassignment of judges is an efficient means to handle these fluctuations, because the data show that changes in filings differ widely by district. In 1988, for instance, filings increased by 19.6 percent in Arizona, but declined by 16 percent in Hawaii. See Tables 1 and 2.

The second major effect of dividing the Ninth Circuit would be to undermine the operation and efficiency of the Bankruptcy Appellate Panel. The Bankruptcy Appellate Panel (or BAP) is a special appellate court composed of bankruptcy judges sitting in three-judge panels who, with the consent of the parties, hear appeals from trial-level decisions of bankruptcy courts. In circuits in which a BAP has not been established, first-level bankruptcy appeals are heard by the district courts. The Federal Courts Study Committee has endorsed the benefits of BAPs and recognized that BAPs operate more effectively in large circuits.

It is inefficient to maintain a BAP in a small circuit because of the statutory rule that a BAP judge may not hear an appeal in a case arising from his or her district. See 28 U.S.C. § 158(b)(3). As a result of this same-district rule, a BAP must generally contain at least five judges. This is so because it is likely that more than one BAP judge will come from the largest district, while at the same time the BAP must contain three other judges to hear appeals from the large district. Thus, if the Ninth Circuit were split, and each resulting circuit established a BAP, the two BAPs together would have to contain at least ten judges. The Ninth Circuit BAP now operates with only seven judges.

In a small circuit dominated by a single district, the same-district rule makes it almost impossible to maintain a BAP. This is so because a large proportion of appeals come from a single district, and a similarly large proportion of the bankruptcy judges are disqualified from hearing those appeals because they also come from the dominant district. In such a circuit, almost every judge from the smaller districts must sit on the BAP.

The Federal Court Study Committee has recognized the difficulty of maintaining a BAP in a small circuit. The interim report of the FCSC recommends that two or more circuits be authorized to form a joint BAP. This is a sound solution for the existing small circuits on the east coast. For the Ninth Circuit, the more sensible solution is not to divide the circuit in the first place.

It is very important that the BAP not be undermined, because the BAP contributes substantially to the quality and efficiency of justice in the Ninth Circuit.

First, the BAP produces decisions of the highest quality. A survey performed by the Federal Judicial Center among attorneys who practiced before the Ninth Circuit BAP revealed the following information. Fully, two thirds of attorneys responding to the survey stated that the BAP gave bankruptcy appeals closer scrutiny than the district court. A similar proportion stated that BAP decisions were more likely to be correct than district court decisions. Sixty percent of the attorneys stated that BAP opinions were "better products" than district court decisions regarding bankruptcy appeals. See J. Sloan & G. Bermant, Bankruptcy Appellate Panels: The Ninth Circuit's Experience, 21 Ariz. St. L.J. 181, 212-216 (1989).

Second, the BAP relieves the workload of the Article III courts. Every appeal decided by a BAP need not be decided by the district court. The effect of the BAP is not simply to shift workload to bankruptcy judges, however. The study of the Federal

Judicial Center concluded that the BAP actually reduces the number of appeals to the Court of Appeals, because further appeal is taken less frequently from BAP decisions than from decisions of the district court. Id. at 209-11. The FJC study concluded that in 1987 this effect alone reduced the number of appeals to the circuit by 135. Id. That there are fewer appeals from BAP decisions is undoubtedly the result of the high regard attorneys have for BAP decisions.

Third, the BAP contributes substantially to the uniformity of decisions regarding bankruptcy law within the circuit. Most appellate decisions regarding bankruptcy matters are made either by the district court or the BAP. In most cases the parties do not pursue further appeals to the Court of Appeals or the Supreme Court. First-level appeals decided by the BAP are decided under uniform principles across the circuit -- the BAP is a single court that is easily able to remain aware of its own precedents. There is no similar uniformity in appeals decided by the district court. Such decisions are rendered by approximately 84 different district judges sitting singly. In essence, these district judges constitute 84 separate appellate courts. Moreover, each district judge hears so few bankruptcy cases each year that he or she is unable to develop any meaningful expertise in the area or keep up with developing case law.

The Federal Courts Study Committee has recognized the benefits provided by BAPs. The tentative report of the FCSC recommends that BAPs be established in every circuit.

The third major effect of dividing the Ninth Circuit would be to break up a team that has provided extraordinary leadership over the past dozen years. Others have described the innovations the Ninth Circuit has made at the court of appeals level in increasing the efficiency of the court and consistency of opinions. The leadership of the Ninth Circuit has also made very important contributions to the smooth functioning of the bankruptcy courts. Although the First Circuit operated a Bankruptcy Appellate Panel briefly, the BAP, with all its numerous benefits, is in reality a creation of the Ninth Circuit. The Ninth Circuit must also be credited with drafting the Emergency Rule. The Emergency Rule kept the bankruptcy courts in operation for two years following the Marathon[1] decision, and was the basis for the jurisdiction provisions of the 1984 Bankruptcy Amendments.

Most important, the Ninth Circuit has taken steps to integrate bankruptcy judges into the judiciary more fully. My colleagues from other circuits often complain that they are excluded from functions at both the district and circuit level and are not asked to participate in decisions that affect them. That has not been the case in the Ninth Circuit, where extraordinary steps have been taken to include bankruptcy judges fully in all decision making. A bankruptcy judge has been included on the circuit council as an observer. There are bankruptcy judges on virtually every committee of the Ninth Circuit Judicial Conference, and the circuit committee on the bankruptcy courts is chaired by a bankruptcy judge. The circuit council established a conference of chief bankruptcy judges to bring those judges together to address common problems. Bankruptcy judges also participate fully in all activities of the Ninth Circuit's annual conference. The leadership at the circuit level has yielded benefits at the district level also.

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[1] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

I cannot overemphasize how important the leadership of the Ninth Circuit has been to the morale and smooth functioning of the bankruptcy courts. If the Ninth Circuit is divided, the same quality of leadership may be maintained in each of the new circuits, but there is a substantial possibility that it will not. Genuine leadership is an elusive thing.

In sum, on behalf of the bankruptcy judges of the Ninth Circuit, I strongly urge that the Ninth Circuit not be divided. The practical effect of dividing the Ninth Circuit would be to undermine the operation of the BAP, to lessen the ability of the bankruptcy courts to handle workload crises, and to break up a first-rate management team.

TABLE 1

Percentage Annual Change in Filings by District U. S. District Courts within Ninth Circuit

(Change from Prior Year in
Total Civil and Criminal Filings)[1]

District	1988[2]	1987	1986	1985
Alaska	2.2%	- 6.5%	13.3%	4.9%
Arizona	13.0	- 2.0	-17.9	15.3
N. Cal.	-18.3	-17.3	9.8	6.0
E. Cal.	2.5	.8	- 4.9	6.2
C. Cal.	-10.2	20.7	5.8	10.0
S. Cal.	- 6.9	-20.3	- 1.1	- .3
Hawaii	5.5	- .2	-21.8	7.1
Idaho	13.2	- .5	4.7	2.8
Montana	.5	-12.0	.4	12.4
Nevada	- 4.4	- 3.9	7.3	14.2
Oregon	- 2.6	-18.9	3.6	9.6
E. Wash	-16.4	13.8	.6	5.6
W. Wash.	-21.9	2.7	- 2.9	25.7

Mean annual + or - change 1985-88: 8.7%

[1] Data from Federal Court Management Statistics 1985-88.

[2] Local library did not have 1989 data at time table was prepared.

TABLE 2

Percentage Annual Change in Filings by District U. S. Bankruptcy Courts within Ninth Circuit

(Change from Prior Year in
Petitions Filed Under All Chapters)[1/]

District	1988[2/]	1987	1986	1985
Alaska	-13.2%	25.9%	66.0%	55.2%
Arizona	19.6	19.3	57.8	17.1
N. Cal.	- .8	5.6	36.7	13.5
E. Cal.	12.8	6.0	26.3	15.4
C. Cal.	3.2	5.8	26.6	6.4
S. Cal.	5.2	12.8	23.8	21.3
Hawaii	-16.0	17.9	26.5	10.7
Idaho	- 2.1	8.6	30.0	23.3
Montana	14.3	6.5	22.9	36.6
Nevada	11.9	9.6	39.0	21.3
Oregon	.9	.6	25.8	26.4
E. Wash	2.9	8.6	22.5	13.7
W. Wash.	3.1	- .2	40.6	27.7

Mean annual + or - change 1985-88: 18.6%

[1/] Data from Federal Judicial Workload Statistics for calendar years 1984 to 1988.

[2/] Local library did not have 1989 data at the time table was prepared.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
18TH FLOOR FEDERAL BUILDING - BOX 36053
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102

THOMAS E. CARLSON
JUDGE

TELEPHONE (415) 556-3993

April 24, 1990

Honorable Howell Heflin
United States Senate
Committee on the Judiciary
Washington, D.C. 20510-6275

Dear Senator Heflin:

Thank you for affording me the opportunity to respond to your questions regarding the impact of the Ninth Circuit Court of Appeals Reorganization Act on the bankruptcy courts of the Ninth Circuit.

Your first question noted that judges on the Bankruptcy Appellate Panel serve these panels in additional to their trial-court workload and whether this posed any concerns.

The short answer is that BAP duty imposes a substantial burden on BAP judges and, because BAP judges take a reduced trial-court workload, on the other judges in a BAP judge's district as well. It would clearly be preferable for circuits that have established BAPs to receive additional bankruptcy judgeships. Bankruptcy Appellate Panels will provide substantial efficiencies to the Federal judiciary even if they require the creation of additional bankruptcy judgeships. This is so because they reduce the workload of district judges and article III district judges are a scarcer judicial resource than non-article III bankruptcy judges. The dominant theme of the recently released report of the Federal Courts Study Committee is that article III judges should generally not do work that can be performed competently and constitutionally by non-article III judicial officers.

While the bankruptcy judges of the Ninth Circuit believe additional judgeships should be created for the BAP, they are willing to maintain the BAP, without additional judgeships if necessary, because of the substantial benefits the BAP provides to the courts and litigants. A recent study of the BAP performed by the Federal Judicial Center made the following findings regarding the burdens of BAP service.

> [C]onversations with the Panel judges leave us no doubt that working on the Panels is perceived by them as an honor and an opportunity to serve, for which they are willing to shoulder considerable additional burdens of work. . . . To the extent that a judge's participation on the Panels causes an additional burden on the judge's colleagues on the bankruptcy bench, all of these judges are performing additional work to bring improved judicial service to the litigants.

G. Bermant & J. Sloan, Bankruptcy Appellate Panels: The Ninth Circuit's Experience, 21 Ariz. St. L.J. 181, 218 (1989).

Your second question asked whether there were additional steps the Ninth Circuit should undertake to integrate bankruptcy judges into the judicial family more fully.

After considerable thought and discussion with my colleagues, I am unable to think of a single step that the circuit could take that it has not already taken. As I noted in my testimony, the Ninth Circuit has included bankruptcy judges in all committees and functions relevant to their work. I shared your question with the chief bankruptcy judge of my district, Lloyd King, who posed the question at a recent meeting of the Conference of Chief Bankruptcy Judges of the Ninth Circuit. The chief judges responded that there are no additional steps that the Ninth Circuit should take to integrate bankruptcy judges and that they wanted to convey to your committee their appreciation for the leadership of the Ninth Circuit in improving the operation of the bankruptcy courts.

Please let me know if there is any additional information I can provide the committee.

Sincerely,

Thomas E. Carlson
United States Bankruptcy Judge

Senator **Heflin**. Thank you. We are delighted to have your testimony.

Our next witness is the Honorable Warren E. Burger, the former Chief Justice of the U.S. Supreme Court. Mr. Chief Justice, if you will come forward, we would be delighted to hear from you. We are delighted to see you, sir.

STATEMENT OF HON. WARREN E. BURGER, FORMER CHIEF JUSTICE OF THE UNITED STATES

Chief Justice **Burger**. Thank you, Mr. Chairman. I have been very much interested in listening to the comments and observations of my colleagues and other members of the bar. And I must say that it is reminiscent of what I came to call a syndrome beginning in 1969 as we proposed changes in various aspects of the judicial system on the Federal side, and sometimes on the State side.

The general opposition characterized by and resulting in what we call the syndrome was we don't want to change it because we have always done it that way; we have always done it that way. And I have listened with great interest to what has been said here today, and I see that syndrome operating in the ninth circuit.

I think Senator Hatfield undertook to rehabilitate my credibility as a witness before your committee, Mr. Chairman, but I will add one more note. In my years of practice and my period on the court of appeals, I had argued cases personally and sat as a visiting judge in half of the circuits of the country. I did not sit in the ninth circuit because of the very salutary rule that Chief Justice Warren had placed that he wanted to cut down travel of judges, both because of the time it took and because of the expense.

I think that experience in arguing cases in these other circuits and sitting as a visiting judge gave me an overview of the system that I hope meets the intimations of some of the statements that have been made that since I have been off of the Court for 3 years, I am out of touch with the realities of today's needs.

Computerization of these things didn't begin in the ninth circuit. The third circuit began what the ninth circuit is doing now, and other circuits followed the third, about 10 or 12 years ago, and these were very important developments. Some of it was used to save travel time by having judges use a conference call and sometimes a video conference call, which is used widely in other countries now.

The problem that your committee and the Senate and the House are dealing with now, Mr. Chairman, is essentially the same as the problem with the fifth circuit back beginning in 1969 when we first took it up. There was emotional, almost passionate opposition among some of the judges in the fifth circuit in the begiming to any division of the great fifth circuit tradition.

That circuit, as you know, was really from sea to shining sea. It went almost from the Pacific Ocean down through Florida and Key West. Some of the figures of that circuit have already been mentioned today. It was divided, and I don't think anyone who has followed the problem in that circuit or elsewhere has any conclusion except that it was a good thing to divide it.

Now, the ninth circuit leadership—and it has been very good leadership and very good judges there—has recognized the problem by dividing itself into three divisions. That recognizes the problem, but it doesn't solve the problem.

There had to be in that circuit, as there has been in all the circuits, the need to screen cases for either no oral argument at all, which the legal profession objects to, or a very limited oral argument. And that would explain the figures that the district judge just gave you about the opposition in the ninth circuit among district judges and in the practicing bar on the subject of whether there is a consistency of intracircuit holdings.

Now, calling that panel of 11 judges an en banc hearing is what the modern-day law students call an oxymoron. It is a horrible word—an inherent contradiction. It isn't an en banc hearing at all. If you take the very words "en banc," French or English, it means all of the judges involved. And, of course, the ninth circuit judges saw from the experience of the Fifth Circuit that they had to do something.

Now, the opposition in the fifth circuit to the division melted, as I had hoped it would, the first time they ever had an en banc hearing. There were 26 judges. One of the Florida judges was either ill or recused, so that there were 25 judges.

And you may or may not remember, Mr. Chairman, they built in several of the Federal courthouses, at a very great expense, two benches, one like the bench in this room, and then one a little bit lower in front. They couldn't get all the 26 judges on one bench.

The first case that came up for discussion in the conference on the first en banc case took 4½ hours to discuss. And then my dear friend, Judge John Minor Wisdom, whom I had known since both of us were in private practice, and the other judges who were opposing it finally had to give up.

It simply is not practical or feasible, and it isn't sensible to try to have an en banc hearing with 26, and certainly not with 28 or 29 judges. So this hybrid en banc is something that is addressed to a solution, but you can have 6 judges making a rule that 22 other judges on the same court would disagree with, and that a majority of the district judges would disagree with, but they are all bound by it.

Now, the suggestion that was just made by one of the district judges that if you divided this circuit there would be a cumbersome process of intercircuit assignment—I want to be cautious of the terms I use about that. That just is not so.

Up to the time I became Chief Justice, the intercircuit assignment was routine. We found—and I am sure this doesn't happen in the U.S. Senate or in the Congress generally—that there were occasions when a judge was assigned to the second circuit because by a happy coincidence the World Series was being played that week, and we had judges from the north assigned to the fifth circuit or some other warm circuit where there were fine golf courses.

That is when we first instituted the screening committee. Now, the screening committee process and the Chief Justice's signature is not a cumbersome procedure. I signed thousands of those intercircuit assignments in 17½ years, and neither I nor the committee that passed on it found it any great burden.

There is one suggestion that has been made either in some of the prepared statements and intimated here that perhaps if the circuit is divided, the judges in the northern section of that circuit where there are a great many trees, and therefore a great deal of lumbering business, might be biased—that is the inference I draw from the statement—biased in some way in dealing with such cases.

I find that a very offensive statement to be made that a U.S. judge, having taken an oath of office, is going to be biased because of the economic conditions in his own jurisdiction.

Now, you have been flooded with figures, Mr. Chairman. The reality is when you have an analysis made of them, the old fifth circuit—that is, the present fifth and eleventh circuit—cost of operations, with approximately the same number of judges in the ninth, taking the two together, is $22 million a year, in round figures. And the cost of the ninth circuit, with only one more judge, is $25 million a year.

I haven't undertaken to analyze those figures as to why it is more, but part of it is the maintenance of the additional clerks' offices, which, on the other hand, has been raised as an objection because it would create more expense. There are already branch offices; there are already deputies to the circuit executive.

The cost per case, the cost per judge of running the ninth circuit in its present unified form is higher than the combination of the fifth and the eleventh circuit. I think it suggests that the division of the eleventh circuit not only speeded up the consideration and decision of cases in that total jurisdiction, but it also has reduced the cost both per case and overall.

Now, if you have any cross-examination, Mr. Chairman, I would be very glad to respond in any way that I can.

Senator **Heflin**. I know that you have given considerable thought to the structure of courts and how they might operate more efficiently. Do you have a feeling in regard to an appellate court as to the maximum number of judges that should be on it, and if so, what would that number be?

Chief Justice **Burger**. That has been a subject of discussion, as you have already intimated, for many, many years. I can certainly give my view with respect to the Supreme Court of the United States, and I think it is shared by every member of the present Court and most of our predecessors, that nine was all we needed.

You will recall when you and I were very young there was an effort to increase the Supreme Court to 15. One of the reasons, a very valid reason, for opposing it just on the numbers was that it would take more time for the intercommunication and it would reduce the collegiality, as it is called, and hamper the functioning of the Court.

I wish I knew the answer to the question and the propositions that are inherent in your question, Mr. Chairman. It would be ideal, I think, if we could have no more than nine judges on any bench deciding any one question. But the number of en banc cases in the circuits is not so many that it is a great barrier.

Now, my old court, the Court of Appeals of the District of Columbia Circuit, has been increased since I left. I think there is no great problem when you have 12 or 13 judges assembled on a bench much like yours here. When you get beyond that is when you run into the trouble that the fifth circuit ran into on the first case it ever heard en banc with 25 judges sitting on the bench. It is simply too cumbersome.

Now, in the long run, over the next 20 or 30 years, there may have to be some restructuring of the whole Federal system if growth continues the way it is. There is one way that has not been used enough to curtail this growth, Mr. Chairman—a few judges have done it—and that is to take, when you have a frivolous appeal in the court of appeals, and have the court impose a fine of $5,000 or $10,000 on the lawyer who brought that appeal, unless he can demonstrate that he had no options in terms of dealing with his client.

Now, a few judges in the State courts have done some things of that kind, and I suspect you have followed that. There is an abuse of process going on in this country on the appellate level and in other areas, too. The one cure for that will be to use the legitimate powers of the court to deal with it.

The old concept expressed by Roscoe Pound in 1906 in that famous speech of his on judicial problems and judicial administration that there are too many lawyers making a sporting contest out of the legal process—and the best to curtail that is make it expensive for the lawyers who misuse the system.

Senator **Heflin**. Mr. Chief Justice, you observed the ninth circuit before it was divided into divisions and you have observed it in its division procedures now. Are the present divisional procedures an improvement over what it was before?

Chief Justice **Burger**. I think it would be fair to say it is some improvement, but it does barely more than recognize the problem without solving it. As you know, many cases came from the ninth circuit to the Supreme Court, and speaking for myself I could not be unaware of the fact that the intracircuit problem of the ninth circuit was a real one.

I attended three, four, or five judicial conferences every year and many committee meetings, and when judges are, as I suppose Senators are when they are with other Senators—they will be pretty candid about some of their observations and experiences.

The reaction of the bar that was just mentioned by the preceding witness about how district judges felt and how, I think it was 59 percent of the lawyers consulted about the internal conflicts of the ninth circuit, were consistent with my observation 5 years ago, 6 years ago.

Senator **Heflin**. In the shortcomings of the divisional approach with many judges as opposed to a single en banc procedure with all of the judges, do you have any observations as to why you feel that the en banc procedure with one group of judges is superior as opposed to divisional procedures where you will have a panel that will be sitting, as the ninth circuit has?

Chief Justice **Burger**. I think I would have to respond to that question broadly. I don't think there is an en banc procedure in the ninth circuit at all. An en banc procedure would be every judge who, under the law, by virtue of active service, is entitled to a vote.

And I just restate what I said before. You have a situation now where 6 judges could decide an important issue—6 to 5 in the so-called en banc—and 20 or more of the other judges of the court could disagree with it. Then there is a procedure for having the true en banc, but I am informed that it has never been used in the ninth circuit.

I understand why they don't use it, and that is because it is such a cumbersome procedure to have 28 judges sitting on one case. That is going to continue until the ninth circuit does what the fifth circuit has done.

Now, the objections in the early stages when the division of the fifth circuit was proposed—the objections were just as strong—if anything, more emotional—than the objections in the ninth circuit today. But, finally, they had to recognize reality.

Senator **Heflin**. Well, thank you, Mr. Chief Justice. We appreciate your testimony and we are delighted to hear from you.

Chief Justice **Burger**. It is a pleasure to be here, Mr. Chairman.

[Chief Justice Burger submitted the following answers to questions posed by Senator Thurmond:]

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
CHIEF JUSTICE BURGER
RETIRED

March 30, 1990.

Dear Senator:

Enclosed please find my responses to the questions you submitted to me.

If I can be of any further assistence please let me know.

Cordially,

Hon. Howell Heflin
United States Senate
728 Senate Hart Office Bldg.
Washington, D.C. 20510-6275

ANSWERS TO QUESTIONS POSED BY SENATOR THURMOND

1. Whether the 9th Circuit is divided -- as it surely should be -- or not, authority to create an ad hoc panel of 9 to 13 Circuit Judges to resolve intercircuit conflicts on statutory interpretation is very desirable.

There is no basis to argue that an increase in the number of circuits is a reason not to divide an ungainly monster like the 9th Circuit. Dividing and adding circuits has been going on for 200 years.

But if there is a grain of validity to the concern about adding another Circuit, that is a compelling reason to have a "national en banc" procedure with a panel to resolve intercircuit conflicts -- limited to statutory questions. I would not delegate constitutional issues to such a panel.

2. I strongly believe the 9th Circuit is far too cumbersome and it should be divided. It has no true en banc procedure now. Six judges can now bind more than 100 Article III and Article I federal judges, and that is simply contrary to how a court should function. Indeed, the 9th Circuit procedure as it now is could lead to more Supreme Court cases simply because a Justice could conclude that six Circuit Judges should not be able to control those who did not sit. The 9th Circuit has never had a true en banc. If they did they would discover what the old 5th Circuit found the first time they had a true en banc -- with more persons participating than in the U.S. Senate of 1790.

Senator HEFLIN. Well, we are delighted to have the next panel, and I will call on Irwin H. Schwartz of the Federal Bar Association, Western District of Washington, Seattle, for testimony first.

Mr. SCHWARTZ. Mr. Chairman, if it is acceptable to you, I would yield to Mr. OBrien, who also, I believe, has a plane to catch.

Senator HEFLIN. All right. Mr. OBrien.

PANEL CONSISTING OF JAMES W. OBRIEN, VICE PRESIDENT, BOARD OF GOVERNORS, STATE BAR OF CALIFORNIA, COSTA MESA, CA; IRWIN H. SCHWARTZ, FEDERAL BAR ASSOCIATION, WESTERN DISTRICT OF WASHINGTON, SEATTLE, WA; MICHAEL TRAYNOR, CHAIRMAN, SIERRA CLUB LEGAL DEFENSE FUND, SAN FRANCISCO, CA; EDWARD F. SHEA, WASHINGTON STATE BAR ASSOCIATION, PASCO, WA; AND MARK C. RUTZICK, ATTORNEY, PORTLAND, OR

STATEMENT OF JAMES W. OBRIEN

Mr. OBRIEN. Thank you, Mr. Schwartz.

Good afternoon, Chairman Heflin. My name is James OBrien. I am Vice President of the Board of Governors of the State Bar of California and I am speaking on behalf of that organization.

It is the considered opinion of the State Bar of California that it would not be wise to enact Senate bill 948. As my written statement on this bill indicates, the State Bar of California opposes dividing the ninth circuit for principally four reasons.

First, there is no crisis in the ninth circuit which is different from that which the other circuits are experiencing. Statistics show that all of the Federal circuits are experiencing a caseload crisis. Of course, this crisis is in no small part due to the Nation's drug crisis.

Second, there is nothing to suggest that simply splitting the ninth circuit would, in the long run, produce lasting, significant improvements. Such a superficial measure merely avoids the real problem facing the ninth circuit and all of the other Federal appellate courts. This problem is a continuing, pyramidic growth of workload.

Third, an optimal decision cannot be made regarding the desirability of restructuring the present circuit system without further serious study of the matter. Not enough time has passed to judge fairly and adequately the major innovations which the ninth circuit has instituted. Moreover, in light of the administrative costs which would be incurred in splitting the circuit, a decision to split should not be made too precipitously.

The Federal Courts Study Committee just concluded in December of last year that the ninth circuit, as it is currently structured, is capable of absorbing the anticipated caseload for at least the next 5 years.

Fourth, the relevant evidence currently suggests that innovations adopted by the ninth circuit in recent years have for the most part been successful. I am sure that this committee is familiar with the content of these innovations and is aware that many judges, lawyers, and organizations believe that these measures have been successful.

I thank you, Mr. Chairman, for giving me the opportunity to present the views of the State Bar of California, and I trust that the committee will consider and review the written statement which more fully develops the points that have been made.

[The prepared statement of Mr. OBrien and answers to written questions follow:]

Statement of James W. OBrien
Vice President of the Board of Governors of
The State Bar of California
before the
Senate Committee on the Judiciary
Courts and Administrative Practice Subcommittee
March 6, 1990
226 Dirksen Senate Office Building
2:00 p.m.

Good afternoon, Chairman Heflin and other distingushed members of the Courts and Administrative Practice Subcommittee of the Senate Committee on the Judiciary. It gives me great pleasure to present the testimony of The State Bar of California regarding S.948.

It is the considered opinion of The State Bar of California that, contrary to what proponents of S.948 believe, splitting the 9th Circuit will not "improve the administration and efficiency of the court, promote State uniformity in circuit law, and strengthen the constitutional guarantee of justice to which people are entitled." 1/ Indeed, after careful consideration of this Bill, The State Bar of California has concluded that it would not be prudent to enact S.948.

In reaching our position, we have relied heavily on the following documents:

1. The Tentative Recommendations For Public Comment of The Federal Courts Study Committee, dated December 22, 1989.

1/ 135 Cong. Rec. S5026 (daily ed. May 9, 1989) (Statement by Senator Gorton (R-WA)).

2. The Report of February, 1990 submitted by Judge Patrick Higginbotham to the American Bar Association's House of Delegates on behalf of that organization's Appellate Judges Conference.

3. The Fourth Biennial Report to Congress on the Implementation of Section 6 of the Omnibus Judgeship Act of 1978 And Other Measures to Improve The Administration of Justice in the Ninth Circuit submitted by the Judicial Council and United States Court of Appeals for the Ninth Circuit, dated July 1989.

4. The study entitled, "Administration of Justice in a Large Appellate Court: The Ninth Circuit Innovations Project," prepared by Joe S. Cecil for the Federal Judicial Center dated 1985.

5. The statement of L. Stanley Chauvin, Jr., President of the American Bar Association, before the Federal Courts Study Committee dated January 31, 1990.

6. The 1989 American Bar Association Report of the Standing Committee on Federal Judicial Improvements entitled, "The United States Courts of Appeals: Reexamining Structure and Process After A Century of Growth."

The State Bar of California opposes S.948 for principally four reasons: 1) There is no crisis in the 9th Circuit which is atypical of what the other circuits are experiencing; 2) There is no evidence to suggest that simply splitting the 9th Circuit would, in the long run, produce lasting significant improvements; 3) An optimal decision cannot be made regarding the desirability of restructuring the present circuit system without further serious study of the matter; and 4) To date, the evidence suggests that the innovations adopted by the 9th Circuit in recent years have, for the most part, been successful. I will now develop these four points.

First, there is no crisis in the 9th Circuit which is atypical of what the other circuits are experiencing. As relevant statistics indicate, all of the federal circuits are experiencing a caseload crisis:

- Since 1945, the overall rate of appeals has risen from 1 appeal for every 42 district court terminations to 1 appeal for every 8 such terminations. This translates into a 1,355%, or nearly 15-fold, increase in the rate of federal circuit filings. 2/

- By 1989, the number of overall case participations per circuit judge was almost three

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2/ Tentative Recommendations for Public Comment of the Federal Courts Study Committee, December 22, 1989 (hereinafter "Recommendations") at pp. 99-100.

times more than it was in 1965. Indeed, the Federal Courts Study Committee has noted that, "[c]ertainly in circuits such as the Fourth, Fifth, Sixth, Eighth and Eleventh... there can be no doubt that the caseload per judge is excessive, and in the opinion of the Committee, grossly so."[3]

- In every circuit except the D.C. Circuit and the 2nd Circuit, the number of cases in which each judge takes part exceeds the number (255) that the Judicial Conference uses as its standard for determining an appropriate annual workload for each appellate judge. Furthermore, this number is higher than the 225 merits participations per appellate judge that was found to be an appropriate workload by three experts who carefully considered the matter in 1976. According to a Federal Courts Study Committee poll of circuit judges, most thought that a standard of 225-255 merits participations was an acceptable annual workload standard per judge.[4]

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[3] Recommendations at p. 100.

[4] Recommendations at pp. 100-101.

As these statistics illustrate, phenomenal growth has occurred in the number of appellate cases filed in all of the appellate courts, not just the 9th Circuit.

In addition to the fact that all of the federal circuits are experiencing a caseload crisis, there is evidence to suggest strongly that the pyramidic growth in circuit caseload is due to several national factors which do not disproportionately affect the 9th Circuit:

- Largely due to the nation's drug crisis, the criminal caseload in the federal courts rose by 56% in the 1980s; drug filings by 229%. Drug cases now account for roughly 50% of the criminal appeals.[5]

- Since 1969, for example, the number of employment discrimination cases filed in Federal courts has increased by 2,166%.[6] This increase has undoubtedly contributed to the increase in appellate filings in the circuit courts.

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[5] Recommendations at p. 17.

[6] Recommendations at p. 49.

- The Federal Courts Study Committee has concluded that the Sentencing Guidelines have "significantly increased the federal courts' workload."[7] It is entirely reasonable to assume that this increase has generated an absolute increase in appeals to the federal circuits.

Second, The State Bar of California opposes S.948 because there is no evidence to suggest that simply splitting the 9th Circuit would, in the long run, lead to more "uniform, coherent and efficient development and application of Federal law in the region", as proponents of S.948 maintain.[8] Proponents of S.948 have reached this conclusion principally because a split would reduce the 9th Circuit's size -- both with respect to caseload and judges. However, the caseload growth in the federal circuits, including growth in a smaller 9th Circuit and a newly created 12th Circuit, will only continue to grow until appellate size resurfaces yet again as an issue for the largest circuit court. This upward trend in the number of Federal appellate cases is illustrated by the following data:

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[7] Recommendations at p. 60.

[8] 135 Cong. Rec S5027 (daily ed. May 9, 1989) (statement by Senator Hatfield (R-OR)).

- Since 1981, when the 5th Circuit was divided and the 11th Circuit was created, both the 5th and the 11th Circuits have had an increase in caseloads "that could soon bring them to 20 or more judges each." [9]

- Based on the 255 participations formula, the federal courts theoretically needed 50 additional judges to handle just their 1989 caseload which would have raised the "average" circuit to 17 judges. [10]

- Based on the current federal appellate structure, it is projected that a total of 280 appellate judges would be required in 1994 with a per circuit average of 23 judges. Three courts of appeals would have over 30 judges and the 9th Circuit would have 43. By 1994, the total need for appellate judges would be 315 with a per circuit average of 26 (the 5th Circuit would need 39 and the 9th Circuit 49). By 2009, the total number would be 392 judges (33 per circuit, with the 5th at 49 and the 9th at 61).[11] These projections are based on the 255 participations formula now in use by the Judicial Conference of the United States to determine new judgeship requirements.

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[9] Recommendations at p. 104.

[10] Recommendations at p. 104-105.

- The Federal Courts Study Committee has noted that the growth in caseload in the Federal courts of appeals will further increase the number of judgeships needed for all of the federal courts.[12]

- As the Federal Courts Study Committee has concluded, any decision to effect a permanent system of small circuits would involve dividing and reorganizing not only the 9th, but the 3rd, 4th, 5th, 6th and 11th circuits.[13]

It is clear, therefore, that appellate size will continue to rise, irrespective of the splitting of any particular circuit. A split would only postpone the inevitable.

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[11] Recommendations at p. 105.

[12] Recommendations at p. 101.

[13] Recommendations at p. 106.

Moreover, there is no evidence to suggest that splitting the 9th Circuit will inhibit the tremendous rate of caseload growth in the federal courts of appeals. In our opinion, the current rate of growth in appellate size will stop or slow down only with the implementation of detailed substantive, as well as procedural, reforms. We believe that several of the tentative recommendations of the Federal Courts Study Committee is a good start in this direction.

Third, it would be, in our considered opinion, impossible to make an optimal decision regarding the desirability of restructuring the present circuit system without further serious study. As the Subcommittee knows, the 9th Circuit has instituted several major innovations during the past several years. The success of these measures can only be fairly and adequately determined with the passing of more time. Both the American Bar Association and the Federal Courts Study Committee agree that there should be an in-depth examination of how the federal appellate judicial structure is functioning.[14/] It stands to reason that the 9th Circuit should not be split before the commencement, completion and analysis of such an in-depth examination.

[14/] Recommendations at p. 103; Statement of L. Stanley Chauvin, Jr., supra at 24; Report of the American Bar Association Standing Committee on Federal Judicial Improvements supra.

Furthermore, since in dividing the 9th Circuit, the Federal government would undoubtedly incur significant administrative costs, the decision to split should not be made too precipitously. This is particularly true given the fact that the Federal Courts Study Committee has concluded that for the next 5 years the present appellate system is capable of absorbing the anticipated caseload.[15/]

Fourth, The State Bar of California urges the Congress not to pass S.948 because, to date, the evidence suggests that the innovations adopted by the 9th Circuit have been successful. These measures have made significant inroads into the problems which faced, and continue to face, the circuit.

There is substantial evidence suggesting that the 9th Circuit's innovations have created an efficient large circuit; and that intracircuit conflict is not a significant problem in the 9th Circuit:

- As the Committee knows, both the Judicial Council and the 9th Circuit have concluded that the 9th Circuit is operating efficiently.[16/]

[15/] Recommendations at p. 108.

[16/] Fourth Biennial Report, supra.

- The Appellate Judges Conference of the American Bar Association recently rescinded its October, 1973 resolution which supported realignment of the 9th Circuit. This body concluded that, due to the "many intervening, significant changes" which have occurred in the 9th Circuit, its position on circuit realignment is outdated.[17]

- The Cecil Study undertaken for the Federal Judicial Center in 1985 concluded that the Innovations Project implemented by the 9th Circuit successfully eliminated the circuit's large backlog of cases awaiting submission despite an increase of case filings and reduced reliance on visiting judges.[18]

- The Federal Courts Study Committee has noted that, "Professor Arthur Hellman, who has studied the question of intracircuit conflicts in the Ninth Circuit, reports that the panels of that

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[17] Report of the Appellate Judges Conference of the American Bar Association Report to the House of Delegates, supra. The American Bar Association has now "returned[ed] to a position of neutrality" on the question of splitting the 9th Circuit.

[18] Cecil Study, supra at 7.

> court have been faithful to stare decisis, and that the en banc has acted effectively when required."[19]

Hence, we agree with the following statement of the Federal Courts Study Committee: "...it [is] worth letting more time pass before definitively concluding larger circuits are, indeed, unworkable."[20]

I thank you Mr. Chairman, and your distinguished colleagues, for giving me the opportunity to present the views of The State Bar of California on this bill. I hope that the Committee will seriously consider our views.

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[19] Recommendations at pp. 107-108 citing Judges and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court, 51 U. Chi. Law Rev. 541 (1989). If the 9th Circuit is split, the problem of intercircuit conflicts may be exacerbated. As the Report of the Appellate Judges Conference of the American Bar Association to the House of Delegates, supra, states, "Creation of another circuit can only add to the number of conflicts the already crowded Supreme Court must review."

[20] Recommendations at p. 107.

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May 1, 1990

VIA MESSENGER

U.S. Senate Judiciary
Subcommittee on Courts & Administrative Practice
223 Hart Senate Office Building
Washington, D.C. 20510
ATTN: Monique Abacherli

Dear Ms. Abacherli:

As Washington counsel to The State Bar of California I am enclosing the responses to the additional questions directed to James W. OBrien, Vice President of the Board of Governors of The State Bar of California, regarding his testimony on S. 948. As you know, these questions were enclosed in a letter dated March 28, 1990 from Senator Heflin to Mr. OBrien in which the Senator asked that Mr. OBrien's responses be provided to you.

If the Committee needs any clarification or elaboration concerning Mr. OBrien's responses, please do not hesitate to telephone me.

Sincerely,

Steven L. Pruitt

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Responses to Questions
Submitted by
Senator Howell Heflin

Question:

HOW DO YOU RESPOND TO THE ARGUMENT THAT THE NEED FOR GREATER REGIONAL REPRESENTATION IN THE NINTH CIRCUIT IS DEMONSTRATED BY THE FACT THAT THE EAST COAST IS COMPRISED OF FIVE JUDICIAL CIRCUITS?

Response:

This argument erroneously assumes that greater regional representation on the west coast is desirable thereby necessitating a split of the 9th Circuit to ensure that the various regions currently in it are fully and adequately represented at the federal appellate level. The argument fails for two principal reasons: 1) there is no magic number concerning how many regions or states should be represented in a Federal circuit; and 2) it incorrectly assumes that geographical size and balance are relevant considerations in determining the optimal structure of a Federal circuit.

First, the judges, lawyers, and legal scholars in this country have not even remotely agreed that the structure of a Federal circuit must not exceed a given number of regions or states to apply Federal law fairly and efficiently. Professor Arthur D. Hellman, for example, a leading scholar of the Federal court appellate system, believes that "a single state should not constitute a single Federal circuit." Neither he,

Additional Testimony
James W. OBrien
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nor to my knowledge any other student of the U.S. judiciary, however, has concluded that not more than a particular number of states or regions should be represented by a Federal circuit. Indeed, to reach such a conclusion would be arbitrary since there is no evidence to suggest that the structure of any given Federal circuit is, in and of itself, in any significant way related to the circuit's level of empirical efficiency and competence. Merely looking at the form, or structure of the 9th Circuit is not a rational basis on which to evaluate the Circuit's substance, or how it operates.

Second, the argument at issue fails because it makes incorrect assumptions about the role geography should play in determining the optimal structure of the 9th Circuit. The argument implicitly places undue emphasis on the relevance of a Federal circuit's geographical size while at the same time fails to recognize that the 9th Circuit's geographical size is an asset. In addition, the argument erroneously assumes that it is important to recognize a concept of "geographical balance" or "regional identity" when evaluating the performance of the 9th Circuit or any other Federal circuit.

Just as it would be arbitrary to conclude that no more than a certain number of states or regions should be included

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in a Federal circuit, there is similarly no rational basis for concluding that a circuit's geographical size should not exceed certain limits. The 9th Circuit's geographical size should not be a determining factor in deciding whether it should be split. Rather, factors such as the consistency and quality of opinions, the median times for filing an appeal to disposition, and the overall administrative efficiency of the 9th Circuit are the relevant factors to consider when evaluating its performance. As the July 1989 Fourth Biennial Report to Congress on the Implementation of Section 6 of the Omnibus Judgeship Act of 1989 submitted by the Judicial Council and the Ninth Circuit ("Biennial Report") and the testimony and statements of those who oppose S. 948 indicate, the empirical evidence reveals that the 9th Circuit is working well when judged against these type of factors.

While the argument at hand places undue emphasis on the relevance of the 9th Circuit's geographical size, it also fails to realize that the 9th Circuit has used its size to its advantage. As the statement in response to S. 948 from the Office of the Circuit Executive of the 9th Circuit indicates, the size of the 9th Circuit is an asset. The Circuit's size has produced a large pool of judges who are available to sit in districts who have a temporary but acute need for judges.

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Moreover, as the Circuit Executive statement highlights, the Circuit's size promotes valuable intellectual interchange with a large group of judges from a great variety of backgrounds. Professor Hellman's statement on S. 948 similarly recognizes that a large circuit can have distinct advantages in carrying out its tasks because of its size.

Finally, the argument at hand fails because it erroneously supposes that it is important for a Federal circuit to have, what Professor Hellman calls "geographical balance, or what proponents of S. 948 call "regional identity." As Professor Hellman's statement on S. 948 indicates, to the extent "regional milieu" is relevant to legal issues, one can expect that it will be developed in the record. Hence a judge hearing a case who is not from the regional milieu in which he or she is sitting should not in any way be at a disadvantage. More importantly, as former Chief Justice Warren E. Burger observed in his testimony on S. 948, it is offensive to the judiciary to suggest that opinions from a particular region of the country reflect any type of regional bias. Valuing the concept of regional identity at the Federal appellate level is, quite simply, inappropriate -- Federal statutes should be uniformly applied and interpreted throughout the country.

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Question:

IF AN INABILITY TO KEEP UP WITH CURRENT CASE LAW DOES NOT ALREADY EXIST IN THE NINTH CIRCUIT, DO YOU SEE THIS BECOMING A POTENTIAL PROBLEM IN THE FUTURE?

Response:

The 9th Circuit is presently fully able to keep up with current case law in the Circuit. Moreover, the position of The State Bar of California is that the 9th Circuit will not have a problem in the future in this regard. Indeed, the Circuit's ability to keep up with case law, regardless of its size, will only improve with time.

The Biennial Report discusses several major innovations implemented by the 9th Circuit and the significant progress achieved in the Circuit as a result of these innovations. Three factors discussed in the Biennial Report have greatly contributed to the Circuit's present ability to keep up with current case law: 1) the Circuit's high level of automation; 2) the Circuit's extensive library system; and 3) the Circuit's very capable staff offices. In spite of a general need for greater congressional funding, these three components have operated such that the Circuit is currently able to keep abreast of 9th Circuit law.

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In evaluating the Circuit's future ability to keep up with current case law, one should especially focus on the work of the Circuit's Office of Staff Attorneys. The attorneys in this Office are, among other things, responsible for monitoring 9th Circuit law for the Circuit judges. To this end, the Office monitors closely the published and unpublished opinions of the Circuit for potential conflicts. The Office's monitoring of 9th Circuit law helps to insure, and will continue to help to insure, that the Circuit judges keep up with current case law. This is so because the Office incorporates its knowledge of 9th Circuit law into the high quality legal research it provides the Circuit judges.

Moreover, since the publication of the Biennial Report, the Office of Staff Attorneys has implemented an innovation, and will soon be implementing yet another, that will serve to enhance further the Circuit's future ability to keep up with case law. First, the Office recently set up a procedure whereby it examines all 9th Circuit cases relating to a rapidly changing area of the law -- the law of sentencing guidelines -- to determine whether any 9th Circuit case or published or unpublished opinion is dispositive. Where a dispositive case or opinion is found, the Office notifies each panel of judges thereby keeping the panels informed of new developments in this fast-moving area of law. This innovation is an example of why my organization does not expect the 9th Circuit to have future difficulty in keeping up with its case law.

Second, the Office of Staff Attorneys will soon be implementing an innovation that will significantly improve the Circuit's future ability to keep up current case law, regardless of the Circuit's size. The Office will be developing an outline of 9th Circuit sentencing guideline law that it will instantaneously update on the Circuit's computer system as the need arises. Hence, when the outline requires revision, the revisions will be transmitted immediately to all of the Circuit judges via computer. After an outline is developed for this area of the law, the Office plans to develop analogous outlines for other rapidly changing areas of the law that are likewise burdensome for the judges to keep up with. Similarly, instantaneous revisions will be made to these outlines via computer as the need arises. As well, the Office will develop outlines of less-fast moving areas of the law in which case revisions will need to be made much less frequently.

Question:

IN ITS TENTATIVE RECOMMENDATIONS, CIRCULATED FOR PUBLIC COMMENT, THE FEDERAL COURTS STUDY COMMITTEE CALLED FOR A PERIOD OF SERIOUS STUDY OVER THE COURSE OF THE NEXT FIVE YEARS OF AN APPROPRIATE STRUCTURE OF THE UNITED STATES COURTS OF APPEALS.

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- WHAT ARE YOUR COMMENTS ON THIS RECOMMENDATION?

Response:

My organization has no objections to this Federal Courts Study Committee recommendation. Seriously studying the entire present circuit structure would inevitably lead to a better understanding of the advantages and disadvantages of the system. With this understanding, one can then arrive at well-founded conclusions from which informed choices can be made regarding the total circuit structure.

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Responses to Questions

Submitted by

Senator Strom Thurmond

Question:

THIS QUESTION IS FOR BOTH MR. OBRIEN AND MR. SHEA. WHAT ARE THE CONCERNS UNIQUE TO STATE BAR ASSOCIATIONS THAT ARISE FROM LEGISLATION SUCH AS S. 948, A BILL WHICH WOULD EFFECTIVELY DIVIDE THE NINTH JUDICIAL CIRCUIT?

Response:

Legislation such as S. 948 gives rise to two principal concerns. While these concerns may not be unique to my organization, they certainly figure prominently.

First, a decision to split the 9th Circuit is a short-sighted approach to the case load crisis and other problems facing both the 9th Circuit and the entire Federal appellate court structure. As the 9th Circuit Executive's statement in response to S. 948 aptly states, "[g]rowth followed by division, followed by division, followed by another period of growth and another division would be an endless process." Our desire is to see long-term, carefully considered decisions made about the structuring of the entire circuit system. Our concern about S. 948, and legislation similar to

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it, is that it fails to make these type of decisions, thereby seriously endangering the viability of the entire circuit structure.

Second, legislation in the vein of S. 948 fails to do justice to the efforts the 9th Circuit has made, and continues to make, to improve the overall functioning of the Circuit. This type of legislation, in precipitously calling for a "quick fix," fails to 1) account for the progress made in the Circuit; and 2) allow sufficient time to pass to evaluate fairly and adequately innovations introduced in the 9th Circuit. Our concern is that the enactment of this type of legislation will thwart the improvements made as well as impede the fair evaluation of innovations introduced.

Question:

THIS QUESTION IS FOR ANY MEMBER OF PANEL IV. IN YOUR ESTIMATE, WHAT WOULD BE THE COST TO THE FEDERAL GOVERNMENT OF CREATING A NEW TWELFTH JUDICIAL CIRCUIT INCLUDING: COURTHOUSE SPACE, COMPUTER EQUIPMENT, LIBRARY FACILITIES, AND ADDITIONAL ADMINISTRATIVE STAFF TO ASSIST IN THE PROPER FUNCTIONING OF THE COURTS?

Response:

My organization is not prepared to respond adequately to this question because we do not have all of the pertinent information necessary to make a fair estimate. For example, we do not know to what extent the books and space of an existing

9th Circuit library could be used by a newly created 12th Circuit. Moreover, we do not know to what extent the recent earthquakes in the region have affected estimates previously made. Nonetheless, we project that a very conservative estimate of the cost to the Federal Government of creating a 12th Circuit would be between $1.9 and $3.5 million.

Question:

THIS QUESTION IS FOR MR. O'BRIEN AND MR. SHEA. CURRENTLY, INDIVIDUAL CIRCUITS HAVE THE ABILITY TO TEMPORARILY ASSIGN JUDGES TO HEAR MATTERS IN OTHER DISTRICTS FOR EXTENDED TRIALS OR EMERGENCY MATTERS. WOULD THE INCREASING DIFFICULTY ASSOCIATED WITH INTER-CIRCUIT TRANSFERS CREATE AN EVEN BIGGER PROBLEM WITH THE CREATION OF AN ADDITIONAL CIRCUIT? WHY OR WHY NOT?

Response:

I am not sure that I understand the question. The 9th Circuit, and I would imagine the other circuits as well, infrequently assigns its judges temporarily to districts in other circuits such that inter-circuit transfers occur. To the extent the 9th Circuit assigns its judges to other circuits, I am not especially aware of there being "increasing difficulties" associated with these transfers. Inter-circuit transfers consistently take considerable time to effectuate because the Chief Justice of the Supreme Court must approve them. Inter-circuit transfers from or to a newly created 12th Circuit would, I believe, similarly take considerable time because they too would presumably have to be approved by Washington.

To the extent this question was intended to ask about intra-circuit, rather than inter-circuit transfers, I am similarly not aware of there being "increasing difficulties" associated with these transfers. Indeed, our experience has been that the temporary assignment of judges to other districts in the Circuit has worked well.

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Senator HEFLIN. Thank you, Mr. OBrien.

Now, Mr. Schwartz, if you will.

STATEMENT OF IRWIN H. SCHWARTZ

Mr. SCHWARTZ. Thank you, Mr. Chairman. I would ask the Chair to permit to incorporate the written testimony that we have previously provided to its staff.

Senator HEFLIN. It will be.

Mr. SCHWARTZ. Thank you, sir.

Mr. Chairman, as I am sure you know, at least we are informed that this bill has been opposed by bar groups in Montana, Idaho, California, Arizona, and Hawaii, in addition to the Federal Bar Association of Western Washington. I would like to take a couple of moments, Mr. Chairman, to try and illuminate for you through the eyes of one trial lawyer why so many lawyers are opposed to this split.

Although much of what you have heard today, Mr. Chairman, has focused upon the functioning of the ninth circuit court of appeals, the fact remains that most of the business of the courts within the ninth circuit is conducted at the district court level.

I come from the western district of Washington, which over the years has found itself hampered by vacancies on the bench due to illness, disability of its judges, and delay in the filling of vacancies.

I have had the opportunity as a lawyer in the western district of Washington to try my Washington cases before a number of judges from the States of Arizona and California. I have traveled to Alaska, where a client of mine was able to obtain a prompt jury trial because a judge from California journeyed that far north to avail him of that constitutional right.

Some of the judges who have spoken with you this afternoon have indicated differing opinions on how difficult it is to have a judge from a different circuit come in and try a case. From my perspective as an individual representing a litigant, I don't want a judge from another circuit.

If I go to another circuit to try the case, I find it necessary to associate counsel from that jurisdiction to advise me of the differences in law between his circuit and the one with which I am more familiar.

But when a judge comes to try a case from out of circuit, no one gives him an associate judge. Having a judge from another circuit creates greater possibilities for trying the case twice than if you have judge from within the circuit.

We, therefore, in western Washington have been very grateful for the assistance that we have had particularly from Arizona and California judges, and we are very much afraid of losing that assistance at a time when we may need it again.

In addition, Mr. Chairman, I will have to agree with Judge Panner that the ninth circuit is a very prolific producer of judicial opinions. And as many of the judges have spoken today, I can assure you that many lawyers' families are familiar with them sitting around in the evening with piles of decisions to be absorbed and digested.

But the advantage to that, Mr. Chairman, is that it gives our clients certainty, and that we can tell our clients—because the ninth circuit hears so many cases and decides so many cases, we can tell our clients with certainty what the law is that applies to them.

If you fragment the ninth circuit into two pieces, we will be in a position of telling our clients, yes, I can tell you what the law will be if this lawsuit is filed in Los Angeles, but, no, I can't tell you what the law will be if it is filed in Seattle because the twelfth circuit has not had an occasion to address that question before.

Our clients look for certainty in the law. They look to us to be guided. When we, in turn, can look to the great wealth of decisions decided by an integrated ninth circuit, we can afford them greater insight into their business transactions and, in turn, they can be more productive, knowing what law it is that they must comply with.

Finally, as to the circuit court itself, Mr. Chairman, I would note I have practiced before the ninth circuit court of appeals since 1972. In the early years, in the early seventies, we in the Northwest felt like stepchildren. Since Judge Browning took over and since the administrative divisions were developed, we are full-fledged members of the circuit. The circuit sits on a monthly basis in Seattle, services our cases, hears our clients, and provides us and our clients with the kind of responsive judicial activity that they need for their businesses. For that reason, Mr. Chairman, we oppose S. 948.

Thank you.

[The prepared statement of Mr. Schwartz and answers to written questions follow:]

TESTIMONY BEFORE THE SENATE JUDICIARY COMMITTEE, SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE ON S. 948

March 6, 1990

Irwin H. Schwartz
On Behalf of the Federal Bar Association
of the Western District of Washington

The Federal Bar Association of the Western District of Washington is a voluntary Bar organization of attorneys who practice frequently before the Federal Courts. Since its formation, the Association and its members have been active in matters promoting the fair and efficient operation of the Courts, including participation in a Courts/Bar mediation program that is considered a national model.

We appreciate the opportunity to testify on S. 948 and to express our views on this very important proposal. The Federal Bar Association of the Western District of Washington opposes the proposal, as we opposed it in 1982 when it was last advanced.

After a great deal of study by the Courts, Congress and the Bar, the 1982 proposal was abandoned in favor of administrative efforts by the Ninth Circuit to deal with problems attributable to its size. Under then Chief Judge James Browning, substantial and positive efforts were made. We in Western Washington were principal beneficiaries of the resulting changes, including the Court of Appeals monthly calendars in Seattle, and expansion of the Circuit Clerk's office and the Circuit library in Seattle. The backlog of cases and elapsed time from filing an appeal to decision were reduced markedly. We believe that the Ninth Circuit is operating well, and oppose splitting the Circuit for the following reasons.

First, the size of the Ninth Circuit has been a help to the Northwest and to Washington in particular. The assistance of the more populous Western States will be lost to us if the Circuit is divided. According to the Ninth Circuit Executive's Office, during 1988 alone, 42 assignments of judges were made from the Districts of the proposed Ninth to Districts of the proposed Twelfth Circuits. Over the last several years, Washington has been a principal recipient of help from District Judges in California and Arizona. Without the assistance of those judges, our dockets would have grown and justice would have been delayed for our clients. In the last three years, 16 District Court judges from California and Arizona were designated to sit in the Western District of Washington. In the event the Circuit is divided, help no longer will be available from those Districts. If Western Washington needs help, it will have to look to its smaller brethren in the Twelfth Circuit, Districts too small to be able to spare a judge or judges. Quite to the contrary, as the largest District in the proposed Twelfth Circuit, Western Washington may be viewed as a District from which others must borrow in time of need.[1] That too could have a most unfortunate effect on litigants in our part of the Country.

Second, the fact that the West is joined in a single Circuit has given regional uniformity to the law and has allowed attorneys to practice throughout the region, to their advantage and to the advantage of their clients. Although some suggest that it is difficult to know the "law of the Circuit" because of the number of opinions published annually, it will be much more difficult to know the law of the two separate Circuits. Conflicts arising from contrary rulings on the West Coast may cause commercial havoc in areas such as admiralty and the law of the commercial ports of the Pacific.

Third, we and our clients benefit from the diversity of the bench of the Court of Appeals for the Ninth Circuit. By computer management, the Circuit sees to it that each judge sits the same number of times with each other judge, and that judges sit in all parts of the Circuit. That distribution enhances both the appearance and the fact of justice. The appearance of justice is promoted for no one can assert that a panel was chosen to "home town" a case, and both the appearance and fact of justice are promoted when panels reflect the broadest mixture of residence, personal and legal backgrounds of the judges. By reducing the number of available Circuit Court judges from twenty-eight in the Ninth Circuit now to nine in the proposed Twelfth Circuit, the benefit of the Court's diversity will be lost to us in large measure.

Fourth, although we have reviewed the position papers of the Bill's supporters, we remain convinced that "it ain't broke, so don't fix it." Size alone is not a problem that effects the quality of work done by the Court of Appeals. Size has created administrative difficulties for the Court, but they seem to have been dealt with through the efforts of the judges and their staff. As we move into the 1990's and as the amount of litigation continues to increase, it very well may be that a larger Circuit is in better shape to deal with the number of issues raised. Let me offer an example.

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[1] There would be only twenty-six active District Court judges in the entire proposed Twelfth Circuit. Ten of them sit in the State of Washington, seven in Western and three in Eastern.

Late last year the United States Supreme Court upheld the federal criminal sentencing guidelines. Among other things, the new sentencing laws allow appeals by both parties from the sentence imposed. The new rights of appeal have dramatically increased the appellate caseload, and created a tremendous number of issues which will have to be addressed in each Circuit. A large Circuit is in a better position to manage the increase in workload, to respond quickly to the new issues and to bring certainty to a very unclear new area of law. It will take far longer for the law to become settled in the smaller Circuits, and the proposed Twelfth Circuit would be among the smallest. A smaller Circuit will not be more efficient in the manner in which it processes its cases or establishes the "law of the Circuit." In addition, splitting the Ninth Circuit would cost millions of dollars for additional infrastructure for the new Court. That money would be better spent by providing additional judgeships.

Fifth, division of the Ninth Circuit probably would renew the debate over whether there should be an intermediate Court between the Courts of Appeals and the United States Supreme Court. Adding a Twelfth Circuit will only increase the number of conflicts among the Circuits, thereby increasing the pressure on the high court.

In sum, the need for division of the Circuit is not demonstrated, but the potential adverse consequences are clear, in our opinion. For these reasons we urge the Committee not to support S. 948.

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April 19, 1990

The Honorable Howell Heflin
United States Senate
Committee on the Judiciary
Subcommittee on Courts & Administrative Practice
223 Hart SOB
Washington, DC 20510

ATTN: Monique Abacherli

Dear Senator Heflin:

Thank you for the opportunity to address the questions raised by Senator Thurmond and you.

I am unable to offer a cost estimate in response to Senator Thurmond's question number two. I can only suggest that this question could be answered by the Office of the Circuit Executive for the Ninth Circuit or perhaps by the Director of the Administrative Office of U.S. Courts.

In answer to Senator Thurmond's question number three, I believe that splitting the Ninth Circuit would adversely affect the development of a cohesive body of federal law within the Western United States and undermine the ability of law firms to provide clients with regional representation. Particularly in the last several years, we have seen law firms throughout the West merging or forming other multi-state associations in order to provide representation to clients whose business is conducted throughout the West. That development has been necessary in order for the legal community to keep pace with its business clients and afford those clients the services they need. To the extent that the West is compartmentalized, the ability of law firms to meet their clients needs will be reduced, and the ability of business to plan and deal with its legal problems on a regional basis will be reduced.

Senator Thurmond asks, in question number seven, whether geographical burdens due to the Ninth Circuit's size are a real impediment to justice. I do not believe that the geographical size of the Ninth Circuit is a burden. From the practicing lawyer's perspective, there is no additional burden at all. The Court of Appeals regularly holds session throughout the Circuit, and although the judges before whom I appear may be from anywhere within the Circuit, it still takes me only ten minutes to walk from my office to the courtroom.

In fact, the situation is substantially improved from the time that I first appeared before the Ninth Circuit in 1972. At that time the volume of cases heard from the Northwest was such that all arguments were held in San Francisco. As the docket grew, it became cost effective for the court to hold monthly calendars here in Seattle. There would be no lesser burden in a Twelfth Circuit. I think the same is true from the judges' perspective; it takes no longer to go from San Francisco to Seattle than it does to go from Seattle to Anchorage. The nature of federal legal practice in the 1990's is such that we often may spend more time travelling to or attending upon a local court than it takes to appear before the Court of Appeals for the Ninth Circuit. In short, I do not believe that the size of the Ninth Circuit is an impediment to justice. To the contrary, I believe that fragmentation of the Ninth Circuit could create injustice.

Senator Heflin asked for a reaction to the fact that the Western United States is included in one appellate circuit, while the East Coast has five circuits. I think the number of circuits on the East Coast primarily is a function of the history of the U.S. Courts system. At the time those circuits were created, geographical distance was a considerable barrier to the conduct of the court's business. It no longer is.

Unlike others who have spoken in answer to Senator Heflin's second question, I do not believe that the number of decisions generated by the Ninth Circuit creates a problem for the Bar or for the public. I believe the contrary is true. While the Ninth Circuit produces a substantial number of opinions, there is a signal advantage to its defining the law. As a practitioner I can far more readily determine the state of the law on a particular question and advise my clients accurately about it than I could in a small circuit. A Circuit Court of limited size often will not have an opportunity to address a specific question. Although at times it may seem that I spend too long staying abreast of decisions of the Court of Appeals, I feel very much like a motorist in an unfamiliar city; I am thankful for many signposts along the way and much prefer that to searching for an uncharted way.

Finally, I agree with the Federal Courts Study Committee that an additional period of examination and reflection is required in order to chart the future of the federal court system as we move toward the next century. If the people of the United States remain as litigious as they are now, the pressure upon the federal courts will continue to increase. Planning is needed now in order to assure the public that it will retain its right of access to the courts.

Very truly yours,

Irwin H. Schwartz

IHS:sp

CC: The Honorable Alfred T. Goodwin
The Honorable Barbara J. Rothstein
The Honorable Thomas Carlson
Professor Arthur Hellman
Eric Redman, Esq.

Senator HEFLIN. Mr. Traynor.

STATEMENT OF MICHAEL TRAYNOR

Mr. TRAYNOR. Thank you, Mr. Chairman. I am Michael Traynor, chairman of the Sierra Club Legal Defense Fund. We thank you for inviting us.

Our opposition to splitting the ninth circuit is joined by the National Wildlife Federation, the National Audubon Society, the Natural Resources Defense Council, the Sierra Club, and the Wilderness Society.

Many of our most important cases involve Federal environmental disputes arising in the States covered by the U.S. court of appeals for the ninth circuit. The ninth circuit includes over 70 percent of this Nation's Federal public lands.

A single court of appeals that can determine a rule of law for application across this large territory, with its transregional environmental issues, significantly enhances the opportunity to protect and manage our public resources. Splitting the ninth circuit could fracture the unified interpretation of the Federal environmental laws that the ninth circuit now applies consistently throughout the Western States and across natural ecosystems that span the political boundaries of the proposed new circuits.

When Congress approved legislation dividing the fifth circuit, its enactment had the support of every branch of Government, as well as the bar associations of all affected States, except Louisiana. The judges of the fifth circuit had strongly supported division of their court. Such division had the support of virtually every Senator and Congressman representing the States throughout the circuit.

By sharp and critical contrast, this bill enjoys no similar uniformity of support. The appellate judges of the ninth circuit oppose the bill unanimously, and the district judges oppose it overwhelmingly. Legislators are sharply divided over the wisdom of this proposal. Also opposed are the State bar associations of Arizona, California, Hawaii, Idaho, Montana, and Nevada, the attorney representatives to the Ninth Circuit Judicial Conference.

The ninth circuit has demonstrated that a large circuit can work. We are proud of the successful and effective leadership that Chief Judge Goodwin, his predecessor, Chief Judge Browning, and their colleagues have contributed. All of us who are concerned with the administration of justice have much to learn from their example.

On the basis of sound environmental principles, as well as fundamental principles of interinstitutional respect, we urge you to reject this proposal for what it is, a groundless proposal to divide an efficient and effective ninth circuit.

Thank you, Mr. Chairman.

[Material submitted by Mr. Traynor follows:]

STATEMENT

OF

MICHAEL TRAYNOR

Chairman, Sierra Club Legal Defense Fund

In Opposition to S. 948

(Proposal to divide the United States Court of Appeals for the Ninth Circuit)

Before the

Subcommittee on Courts and Administrative Practice
Committee on the Judiciary
United States Senate

March 6, 1990

Mr. Chairman and Members of the Subcommittee:

I am Michael Traynor, Chairman of the Sierra Club Legal Defense Fund. We thank you for including us in the discussion of S. 948.

INTRODUCTION

The Legal Defense Fund is a non-profit, public interest law firm, separate from the Sierra Club, that represents citizen groups in litigation to protect our nation's natural resources and enforce our federal environmental laws. We have 6 offices across the country and employ nearly 30 lawyers. Many of our most important cases, however, involve federal environmental disputes arising in the states covered by the United States Court of Appeals for the Ninth Circuit.

This is hardly surprising since the Ninth Circuit includes within its jurisdiction over 70% of this nation's federal public lands. The Circuit also encompasses many vital regional waterways, thousands of miles of ocean coastlines, unparalleled marine habitat and abundant natural resources ranging from minerals to fisheries to grazing lands to unique desert and forest ecosystems found nowhere else in the world. The stewardship of these important resources and their uniform management in accordance with our environmental laws is of critical concern to people throughout the United States.

It is from this perspective -- as a trustee of an organization that regularly practices before the Ninth Circuit and that brings to that Court many difficult and challenging environmental cases -- that I speak to you today in opposition to S. 948.

You have heard from many distinguished opponents, whose views we share, how S. 948 would produce yet another source of inter-circuit conflict for the already overtaxed Supreme Court to address, contradict the views of an overwhelming majority of both the Ninth Circuit judges and the district judges within the Ninth Circuit, and set back the exemplary procedural and substantive progress the Ninth Circuit has achieved in managing the docket of the nation's largest federal court of appeals. S. 948 would incur all of these costs without advancing any important judicial or administrative purpose. Indeed, empirical analysis indicates that inconsistency and conflict in the law of the Ninth Circuit are not serious problems. See A. Hellman, Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court, 56 U. Chi. L. Rev. 541 (1989). Hence a major premise of S. 948 is unfounded. In short, the Ninth Circuit has demonstrated that a large circuit can work. We are proud of the successful and effective leadership that Chief Judge Goodwin, his predecessor, Chief Judge Browning, and their colleagues have contributed. All of us who are concerned with the administration of justice have much to learn from their example.

From my perspective as an advocate for careful management of our natural resources and a practitioner before the Ninth Circuit, however, I would like to focus on two additional reasons -- one practical and one institutional -- for rejecting S. 948.

First, splitting the Ninth Circuit along the lines proposed in S. 948 could fracture the unified interpretation of the federal environmental laws that the Ninth Circuit now applies consistently throughout the western states and across natural ecosystems that span the political boundaries of the proposed new circuits. Second, splitting the Ninth Circuit over the objection of its judges would represent a sharp and unwise break with the respect that legislatures and courts traditionally accord each other, especially in matters involving their own self-governance.

THE EXISTING NINTH CIRCUIT IS WELL SUITED TO ADDRESS CONSISTENTLY AND UNIFORMLY THE BROAD REGIONAL ENVIRONMENTAL ISSUES OF THE WESTERN UNITED STATES

The large territory under the Ninth Circuit's jurisdiction includes many natural resources, ecosystems and environmental problems that cross the borders of the states within it. A single court of appeals that can determine a rule of federal law for application across this large territory, with its trans-regional environmental issues, significantly enhances the opportunity to protect and manage our public resources. Moreover, a survey of the Ninth Circuit's published opinions on environmental subjects since the beginning of 1987 reveals a consistent and uniform application of the environmental laws regardless of where the case arises or which judges are assigned to hear it.

A. The Existing Ninth Circuit Can and Does Address Trans-Regional Environmental Issues More Effectively Than a Split Circuit Would.

Even a brief review of recent Ninth Circuit decisions in the environmental area provides ready examples of the important advantages the current Ninth Circuit possesses for addressing effectively trans-regional environmental issues.

For instance, in 1988, the Ninth Circuit decided two cases from Montana, Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988), and Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988), clarifying the requirements the National Environmental Policy Act and the Endangered Species Act impose on government leases of the right to drill for oil and gas on public lands. Although the particular cases arose in Montana, they establish rules of law that apply to oil and gas leasing overlying a substantial part of a vast geologic formation known as the Overthrust Belt. As the Ninth Circuit noted, this formation "run[s] north-south from Canada to Mexico." Conner, 848 F.2d at 1443.

The ability of a single court of appeals to interpret and apply the environmental laws to the government's oil and gas leasing program across most of the Overthrust Belt avoided a host of potential difficulties that would arise for both the natural resource and the federal agencies that administer it if multiple courts of appeals had to address and decide the same environmental issues. Indeed, having several courts reviewing decisions on this issue would be an invitation to institutional conflict.

Similarly, in 1988, the Ninth Circuit decided a case involving the actions and composition of the Pacific Fisheries Management Council, Northwest Environmental Defense Center v. Gordon, 849 F.2d 1241 (9th Cir. 1988) (confirming the availability of remedial measures in setting harvest and escapement levels in future years to correct violations of the law in past years). As the Court noted, the Pacific Fisheries Management Council prepares annual fisheries management and conservation plans that encompass the ocean and anadramous fishery resources of California, Oregon, Washington and Idaho. In most cases, these fisheries are part of a complex yet distinct marine ecosystem.

The availability of a single court of appeals to resolve environmental challenges to the Management Council's actions has both practical and legal advantages over the potential for inter-circuit conflict that S. 948 would create. A crucial practical advantage is that the interrelated Pacific Coast fisheries are managed by one agency whose actions a single court of appeals eventually reviews. Under a single court of appeals, there is no opportunity for one portion of the fishery to be subject to one interpretation of federal law while another portion of the same fishery must be managed under a different interpretation of law. Nor is there an opportunity for the Management Council to choose among potentially conflicting interpretations of its legal responsibilities announced by different circuits both having jurisdiction of its actions. An equally important advantage is that the availability of a single appellate forum prevents any party from filing a case in a particular district court in hopes of obtaining eventual review by a more favorable appellate court.

The central point is that the existing territorial jurisdiction of the Ninth Circuit encompasses both natural systems and environmental issues that are now subject to a single uniform rule of law. Such unified judicial administration is an important asset to western states that would be lost under the split appellate courts proposed by S. 948.

B. There is No Regional Divergence Within the Ninth Circuit in Its Interpretation and Application of Environmental Laws.

Of course, the unifying advantage in the environmental area of the Ninth Circuit's current territorial scope could be undercut if, as some of the proponents of S. 948 have contended, environmental issues arising within a particular region of the Court were decided differently by members of the Court from outside that region than they would be by members of the Court from within the region. Fortunately, it is easy to demonstrate that this kind of regional split on environmental issues among the judges of the Ninth Circuit simply and emphatically does not exist.

We have surveyed the published opinions of the Ninth Circuit on all environmental topics since the beginning of 1987. There are more than 110 such opinions covering matters on virtually every aspect of federal environmental regulation. Out of all of these opinions, in only one did a Circuit Judge appointed from a state that would be in the new 12th Circuit proposed by S. 948 file a dissenting opinion -- and in that single case the other two judges on the panel also were from states that would be in the new circuit. See Ducey v. United States, 830 F.2d 1071 (9th Cir. 1987) (Farris, J. dissenting). Similarly, in the 45 of these 110 Ninth Circuit environmental cases that involve suits by citizen environmental groups, the plaintiffs won proportionally more reversals of the district court where the panel of circuit judges included two judges from the proposed new 12th circuit than they did where the majority of the panel was from outside the proposed new circuit (a 60% reversal rate versus a 54% rate). Finally, overall, the environmental opinions of the Circuit over the past three years are about evenly split between affirming and reversing judgments of the district courts, both those district courts within the proposed new circuit and those outside it.

Certainly, these figures reveal neither domination of a particular region by judges appointed from states outside the region nor an overall tendency in the existing Ninth Circuit to side with environmental interests. These conclusions will surprise no one actually familiar with the Court, yet they bear presentation here because of the contention by some that the Circuit must be split to avoid the imposition of such a bias on the states of the proposed new circuit. The diversity of experience and perspective that judges of the Ninth Circuit have brought to their task has contributed to a unified system of law and to intracircuit harmony. There is no assurance that comparable advantages would obtain on splitting the Circuit.

In sum, the Ninth Circuit as it exists today is far better positioned than a divided circuit would be to address consistently and uniformly the broad regional environmental issues that arise in the Western United States.

THE NINTH CIRCUIT SHOULD NOT BE SPLIT OVER THE VIRTUALLY UNANIMOUS OBJECTION OF ITS JUDGES

The legislative and judicial branches of our government traditionally accord each other great respect and comity in matters involving their own self-governance. Thus, after decades of restraint and only under the compulsion of the constitutional command of equal protection of the laws, did the Supreme Court, in Baker v. Carr, 369 U.S. 186 (1962), authorize judges to reapportion legislatures. Courts still exercise this delicate authority sparingly. After comparable consideration, the Congress recently declined to unilaterally reapportion federal circuit courts against the opposition of the affected circuit judges. Instead, Congress invited any court of appeals with more than fifteen active judges to introduce innovative procedures or to seek division. The Fifth Circuit has chosen division and the Ninth Circuit has chosen innovation, a choice that has been remarkably successful. For the relevant history concerning the Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 28 U.S.C. §§ 41, 44-46, 133, and the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 28 U.S.C.

§§ 1, 331-32 & 372, see S.Rep. No. 95-117, reprinted in 1978 U.S. Code Cong. & Admin. News 3569; S.Rep. No. 96-362, reprinted in, 1980 U.S. Code Cong. & Admin. News 4315.

The difference between the circumstances that led to division of the Fifth Circuit and those that S. 948 presents bear close examination. When Congress approved legislation dividing the Fifth Circuit, its enactment had the support of every branch of government as well as the bar associations of all affected states except Louisiana. S.Rep. No. 95-117, supra, 1978 U.S. Code Cong. & Admin. News at 3601-3605. The judges of the Fifth Circuit had strongly supported division of their court. See Id. at 3609. The bill to accomplish this result had the support of virtually every senator and congressman representing the states throughout the circuit. In addition, the Justice Department had indicated its support for the division. See Id. at 3605.

By sharp and critical contrast, S. 948 enjoys no similar uniformity of support among the three coordinate branches of our government. The judges of the Ninth Circuit, representing the branch of government whose support should be most crucial to S. 948, almost unanimously oppose the bill. The representatives of the legislative branch are sharply divided over the wisdom of this proposal. The executive branch, through the Justice Department, has been silent on S. 948. Finally, the attorney representatives to the Ninth Circuit Judicial Conference, the group of attorneys most familiar with Ninth Circuit practice and procedure, overwhelmingly oppose S. 948. See Res. No. 9 of the

1989 Ninth Circuit Judicial Conference, Opposition to Dividing the Ninth Circuit (and attached tally). Under these circumstances, fundamental notions of inter-institutional respect and comity counsel rejection of S. 948.

Indeed, in the absence of any constitutional command or compelling and widely accepted reason to enact S. 948, it is appropriate to ask whether this proposed reapportionment of the Ninth Circuit is simply the unwelcome cousin of the political gerrymandering of legislative districts. Certainly, some of the sponsors of this proposal share sponsorship and support of recent legislative measures to stifle judicial review of violations of important environmental laws. See Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, sec. 318, 103 Stat. 701, 745-50 (1989); see also 135 Cong. Rec. S12961-62 (daily ed. Oct. 7, 1989)(statement of Senator Gorton in support of Section 318); id. at S12979 (similar statement of Senator Hatfield). We are deeply concerned that S. 948, if adopted, would set an improper precedent inviting other interests to slice up courts when they are dissatisfied with their decisions. Such tactics have no place in our system of government.

CONCLUSION

On the basis of sound environmental principles as well as fundamental notions of separation of powers and inter-institutional respect, we urge you to reject S. 948 for what it is -- a groundless proposal to divide an efficient and effective Ninth Circuit.

Sunrise, Mt. McKinley Ansel Adams

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April 26, 1990

The Honorable Howell Heflin
United States Senate
Committee on the Judiciary
Subcommittee on Courts and Administrative Practice
223 Hart Senate Office Building
Washington, D.C. 20510

Re: S. 948

Dear Senator Heflin:

Thank you for affording us the opportunity to answer the supplemental questions on S. 948 that you and Senator Thurmond have posed.

The questions concern the claimed need for a division of the existing Ninth Circuit Court of Appeals and the attendant costs. Our answers are set forth below following each question. After considering each question thoroughly, we remain convinced that S. 948 should be rejected.

As with our testimony before your Subcommittee on March 6, 1990, the National Audubon Society, the National Wildlife Federation, the Natural Resources Defense Council, The Wilderness Society and the Sierra Club, join in our answers. Their letters of endorsement are attached.

QUESTIONS FROM SENATOR HEFLIN

1. How do you respond to the argument that the need for greater regional representation in the Ninth Circuit is demonstrated by the fact that the East Coast is comprised of five judicial circuits?

Congress established the present geographic boundaries of the five East Coast circuits in 1866. They remained virtually unchanged until 1980 when Congress split the fifth circuit. Compare Act of July 23, 1866, 14 Stat. 209 (establishing nine circuits and their boundaries) with 28 U.S.C. § 41 (current circuit court boundaries). The boundaries of these eastern circuits date from a time when the Supreme Court Justices still "rode circuit" and transportation was limited and slow. The present geographic configuration of the eastern circuits is the product of history. It would be difficult to rationalize it on the ground of regional representation.[1] It is, in any event, the judges of the court, not arbitrary or ancient boundary lines, that provide regional representation within a circuit. The East Coast pattern thus affords no support for the argument that the Ninth Circuit presently lacks adequate regional representation.

Indeed, prior to the division of the Fifth Circuit in 1980, the only significant twentieth century change in the boundaries of the courts of appeal occurred in 1929 when Congress divided the Eighth Circuit to create a new Tenth Circuit. See Act of February 28, 1929, 45 Stat. 1346. Among the major reasons for division of the Eighth Circuit were the difficulties in that day of transportation and communication over large distances. See H. Rep. No. 2464 (to accompany H.R. 16658), 70th Cong., 2d Sess. at 4 (Feb. 11, 1929).[2] The absence of regional representation within a larger circuit was not an issue.

Regional representation is one of the significant strengths of the existing Ninth Circuit. Traditionally there have been judges on the court from every part of the circuit's territory. This broad representation has afforded the court a great breadth and range of backgrounds among its members. When the court has experimented with smaller regional groupings of judges, the judges themselves have found the experience unsatisfactory.[3] Moreover, there is no tangible evidence of either regional under-representation or regional dominance within the existing court.[4] The active judges of the court bring the kind of diversity to the court's bench that is most likely to prevent provincialism and promote thoughtful and uniform application of our national laws.

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[1] For example, there is no regional logic to placing Vermont and New Hampshire in separate circuits or for including Maine and Puerto Rico in the same circuit. Similarly, there is no sense in which regional representation is enhanced by placing Michigan and Tennessee in the same circuit ~~while placing~~ Maryland and Delaware in separate circuits.

[2] In addition, division of the Eighth Circuit had the almost unanimous support of the affected judges and state bar associations. See H. Rep. No. 2464 (to accompany H.R. 16658), 70th Cong., 2d Session at 3 (Feb. 11, 1929).

2. If an inability to keep up with current case law does not already exist in the Ninth Circuit, do you see this becoming a potential problem in the future?

Keeping up with recent developments in the law is a significant challenge for all judges and attorneys today wherever they sit or practice. That challenge will certainly exist in the future. However, it is not a challenge peculiar to the Ninth Circuit; it will continue to confront lawyers and lawmakers across the country.[5]

At the federal level, we all must keep up with decisions of the Supreme Court, our own circuit's law and decisions from other circuit and district courts to be aware of and understand emerging trends in the law. Most attorneys also must stay abreast of developments in the law of one or more states. This is indeed a daunting task. Dividing the Ninth Circuit would do nothing to ameliorate this problem.

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[3] See Office of the Circuit Executive, Comments on S. 948, Ninth Circuit Reorganization Act at 5 (June 2, 1989).

[4] For example, in 1988, 52% of appeals in the Ninth Circuit were from California district courts and 51% of the Circuit's active and senior circuit judges resided in California.

[5] For example, in 1989, the Fifth Circuit issued 2393 published decisions and the Sixth Circuit issued 2274. By comparison, the Ninth Circuit issued 2456 published opinions. Dividing the Ninth circuit would not reduce these numbers or change the challenge of keeping up with the law. AO Director's Report, Table S-5 (1989).

Instead, dividing the circuit would increase the challenge of staying abreast of legal developments. Many of us who practice before the Ninth Circuit represent clients with interests that span the West Coast. Today, if we keep up with the decisions of the Ninth Circuit, we can advise and represent those clients whether their problems arise in Arizona or Alaska. If the court of appeals is divided, we will have to add the decisional law and internal procedures of yet another jurisdiction to an already full agenda in order to give our clients current and accurate advice.

Of equal importance, if the court is divided, we could lose in the new circuit the existing and significant efforts of the Ninth Circuit to make its decisions widely and quickly available to attorneys, unless the new circuit expended the money and effort to quickly make such a service available. These efforts minimize the challenge of keeping up with the law. They include, for example, same day distribution of filed opinions to branch libraries around the circuit and a computer bulletin board to which new opinions are posted on the day of filing. This bulletin board is available to anyone with a telephone and personal computer. Such innovation is a hallmark of the Ninth Circuit's efforts to reduce the burden of keeping up with the law.

3. In its tentative recommendations, circulated for public comment, the Federal Courts Study committee called for a period of serious study over the course of the next five years of an appropriate structure of the United States Courts Of Appeals. What are your comments on this recommendation?

We note that among the preliminary recommendations of the Study Committee is the conclusion that the innovations of the present Ninth Circuit, developed in order to manage its size and caseload, may well be the model for restructuring the courts of appeals in the future. The Study Committee reaffirmed these preliminary findings in its final report issued April 2, 1990 at 116 and 122.

Combination of existing circuits rather than division may offer the best solution to increased filings across the country. See Hellman, A., Restructuring Justice: The Innovation of the Ninth Circuit and the Function of the Federal Courts (Cornell Univ. Press 1990). Further study of these broad and important structural questions seems warranted, especially at a national level.

At the same time, there is no need for further study to determine that division of the Ninth Circuit as proposed in S. 948 is both unwise and unnecessary. The court is both innovative and efficient. Neither its judges nor the majority of the affected bar associations favor its division. The harm to the courts and to the institutional respect of Congress and the courts for each other that dividing the Ninth Circuit under these circumstances could occasion is incalculable. The benefits of division are nonexistent. Accordingly, the Subcommittee can decide now and without any further study to reject S. 948.

QUESTIONS FROM SENATOR THURMOND

2. This question is for any member of Panel IV. In your estimate, what would be the cost to the Federal government of creating a new twelfth judicial circuit including: courthouse space, computer equipment, library facilities, and additional administrative staff to assist in the proper functioning of the courts?

The costs of creating a new twelfth circuit as proposed by S. 948 would be substantial, on-going and, most important, unnecessary.

In order to staff a new circuit court, the administrative office of the courts would need to establish, at a minimum, a new clerk's office, a new circuit executive's office, and a new staff attorneys office.[6] These staffing needs would require initial capital expenses as well as annual operating budgets. Moreover, this new staff would be in addition to the existing Ninth Circuit staff that would have to remain in place to continue serving the remainder of the old circuit.

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[6] The Ninth Circuit clerk's office has one staff member located in Seattle. There are presently no other clerk's office staff in the states that would constitute the new twelfth circuit, nor are there any members of the circuit executive's office or the staff attorneys office in the proposed new circuit.

In order to house a new circuit, Congress would have to authorize funds for a new circuit court building. Currently, there is no federal courthouse facility in the Northwest that could accommodate the new circuit. The Seattle courthouse that now houses the Ninth Circuit judges stationed in Seattle also houses a district court and has no expansion space. Space is even more limited in Portland. The additional space required for a clerk's office, executive's office, staff attorneys' office, library, chief judge's quarters, courtrooms and meeting rooms strongly suggests the need for a new building -- a very substantial capital outlay with continuing maintenance costs.

In order to adequately support a new circuit, there would be other significant costs as well. For example, the Ninth Circuit branch library currently maintained in Seattle (the only circuit library in the proposed new circuit) is rudimentary. Major initial and continuing expenses for a new circuit would be necessary to up-grade this key resource. Similarly, today's modern circuit would require substantial support costs in computers, sophisticated communications, information storage and retrieval and word processing. All of these would add to the start-up costs of a new circuit.

To put a price tag on the cost of all these items, initially and as an on-going proposition, would be speculative for us. It is fair to say, however, that it would cost millions of dollars for the initial capital costs and more millions in on-going operating costs.

The most important aspect of these substantial costs is that they are unnecessary. The Ninth Circuit now provides all of these circuit court services to the states of the new circuit proposed in S. 948. Ninth Circuit judges regularly hear cases in the major cities of the proposed new circuit with appropriate administrative support from the current circuit's headquarters. It is far more cost efficient to assemble panels of judges to hear cases in the cities of the Northwest than it would be to create from scratch a new court of appeals in the region.

7. This question is for Mr. Schwartz and Mr. Traynor. Are the geographical burdens inherent in a circuit as large as the Ninth Circuit a real impediment to justice that could best be resolved by splitting the circuit in half?

In today's world of instant electronic communication and rapid air transportation, geographic burdens generally have all but disappeared. Certainly, such burdens are not an impediment to justice in the Ninth Circuit, either for counsel or the court. Instead, the loss of judicial diversity that would result from dividing the Ninth Circuit could pose a real impediment to justice.

Today, national law firms routinely represent international corporations and other clients in appellate cases across the country. Even for smaller firms and parties, the geographic burdens of an appellate case are minor compared to the substantial attorney time and cost involved in the research and preparation of a case for appeal -- time which generally is spent in the office. The geographic burdens of an appeal essentially boil down to the costs of telephone and postage for communication with the court and airfare for any oral presentation to the court, a small fraction of the overall costs of a case.

In the Ninth Circuit, even these minor geographic burdens are largely mitigated because, most often, the court comes to the cases. Currently, the court sits every month in Seattle, San Francisco and Pasadena, several months a year in Portland, and occasionally in Alaska and Hawaii. The transportation costs for parties in the Northwest would be small even if their case were heard in San Francisco or Pasadena; they are even less significant when the cases are heard in Seattle or Portland. A divided circuit would be unlikely to improve significantly this ready availability of appellate panels to hear cases.[7]

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[7] Nothing in S.948 would mitigate the relative geographic burdens for counsel in Alaska or Hawaii. Both Seattle and (continued...)

Nor is the geographic size of the Ninth Circuit a burden for the court. With electronic mail, telefax transmission, and telephone conferencing, communication among the judges of the circuit is quick, effective and inexpensive. Moreover, air travel moves judges efficiently and relatively painlessly among sitting locations. As Chief Judge Goodwin pointed out in his testimony before the Subcommittee, many judges spend more time each week commuting between home and their chambers than they spend travelling to another court for a week of hearing cases.[8]

Rather than posing an impediment to justice, the Ninth Circuit's size is an important source of the court's strength and depth. Indeed, in the past, the court has experimented with a program in which each judge sat and heard cases only in the areas of the judge's residence. After six months, the judges overwhelmingly voted to discontinue the experiment. The loss of intellectual interchange with a larger group of judges drawn from a greater variety of backgrounds outweighed any perceived benefits. Division of the circuit would make permanent a parochialism that experience led the judges to reject.[9]

4. Mr. Traynor, in your opinion, would adding a twelfth circuit substantially increase the number of inter-circuit conflicts thereby adding to the workload of the Supreme Court? Why or why not?

Inevitably, creation of a new twelfth circuit would increase the number of intercircuit conflicts. How many conflicts would develop, and their nature and significance, is almost impossible to predict. To the extent new conflicts do develop, the need to resolve them

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[7] (...continued)
San Francisco are further from these two states than they are from elsewhere in the Ninth Circuit.

[8] Statement of Chief Judge Alfred T. Goodwin before Senate Judiciary Subcommittee at 5 (March 6, 1990).

[9] *See* Office of the Circuit Executive, *Comments on S.948, Ninth Circuit Reorganization Act* at 5 (June 2, 1989).

will add to the Supreme Court's workload. From the perspective of increased conflicts, however, there are two distinct and serious disadvantages to dividing the Ninth Circuit in addition to an increased Supreme Court caseload.

First, a divided circuit would lose the benefits of the extensive computerized case monitoring system the court now employs to identify similar issues and cases under consideration by different panels. This system does much to minimize conflicting rulings by the existing circuit. It does not seem likely that it would be applied across the boundaries in a divided circuit.

A less obvious, but even more pernicious disadvantage of a divided circuit would be the increased opportunities for executive agency noncompliance with the rulings of one or another of the new circuits. One of the most troubling developments in federal law in recent years has been the decision by one executive agency after another to reject the decisions of the courts of appeal when those decisions are at odds with an agency's national policy. *See. e.g., Hyatt v. Heckler*, 807 F.2d 376, 379 (4th Cir. 1986), *cert. denied*, 484 U.S. 820 (1987); *Beverly Enters. v. NLRB*, 727 F.2d 591, 593 (6th Cir. 1984); *Douglas v. Schweiker*, 734 F.2d 399, 400 (8th Cir. 1984); *Lopez v. Heckler*, 713 F.2d 1432 (9th Cir. 1983), *adhered to*, 725 F.2d 1489, 1496-97, 1500-01 (9th Cir.), *vacated on other grounds*, 469 U.S. 1082 (1984). In such situations, the agencies have refused to follow appellate decisions unless the court imposed a binding and specific order. *See. e.g., Lopez v. Heckler*, 725 F.2d 1489 (9th Cir.), *vacated on other grounds*, 469 U.S. 1082 (1984). This agency disregard for the courts has been termed "intracircuit nonacquiescence." *See* Diller, M. & Morawetz, A., *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz,* 99 Yale L.J. 801 (1990); Estreicher, S. & Revesz, R., *Nonacquiescence by Federal Administrative Agencies,* 98 Yale L.J. 679 (1989).

The problem of nonacquiescence would be aggravated on the West Coast if the Ninth Circuit were divided. Many federal agencies now have jurisdiction over vast areas of the existing Ninth Circuit. The Pacific Fisheries Management Council, with fisheries management responsibility from California to Washington, and the

Bureau of Land Management, with millions of acres of public lands in virtually every Ninth Circuit state, are but two examples. Today these agencies are subject to a single unified rule of law in the west.

If the Ninth Circuit were divided, the opportunities for forum manipulation and nonacquiescence would multiply. In a divided circuit, the affected agencies would first have a chance to manipulate the jurisdiction of the reviewing court to obtain judicial review in the forum they considered most favorable.[10] More importantly, agencies also could refuse to acquiesce in an unfavorable ruling from one of the new circuits if there were either no ruling from the other circuit or the agency obtained a favorable ruling from the other circuit.

Such agency nonacquiescence could be as serious a source of legal conflicts and tension as the other intercircuit conflicts that would develop in a divided Ninth Circuit. There is simply no need to risk such conflicts; they can be avoided by rejecting S.948.

If we can provide any further information or it you have any additional questions, we would be pleased to respond.

Sincerely,

Michael Traynor

Michael Traynor

cc: The Honorable Alfred T. Goodwin
The Honorable Strom Thurmond

20194004

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[10] This manipulation easily could be accomplished by implementing a controversial policy first in the circuit the agency believes is most likely to uphold the policy.

SIERRA
CLUB

730 Polk Street San Francisco, California 94109 415 · 776 · 2211

Michael L. Fischer
Executive Director

March 6, 1990

Senator Howell Heflin
Chair
Subcommittee on Courts and Administrative Practice
223 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Heflin,

The Sierra Club strongly opposes the proposed division of the 9th District Court of Appeals. We are pleased that Michael Traynor, Chairman of the Board of Trustees of the Sierra Club Legal Defense Fund, has been able to take the time to appear before your committee to present many of the compelling reasons against such a division.

We urge you and your committee to give his testimony close consideration, and to turn back the proposal.

Sincerely,

Michael L. Fischer
Executive Director

MLF:la

THE WILDERNESS SOCIETY

GEORGE T. FRAMPTON, JR.
PRESIDENT

March 6, 1990

The Honorable Howell Heflin
Chairman
Subcommittee on Courts and
Administrative Practice
Committee on the Judiciary
United States Senate
223 Senate Hart Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The Wilderness Society endorses and supports the March 6, 1990, written statement of Michael Traynor in opposition to S. 948.

Sincerely,

George T Frampton

George T. Frampton, Jr.

1400 EYE STREET, N.W., WASHINGTON, D.C. 20005

(202) 842-3400

NRDC 20

Natural Resources
Defense Council

90 New Montgomery
San Francisco, CA 94105
415 777-0220
Fax 415 495-5996

VIA FACSIMILE

March 6, 1990

The Honorable Howell Heflin
Chair, Subcommittee on Courts
and Administrative Practice
Committee on the Judiciary
223 Senate Hart Office Building
Washington, D.C. 20510

Re: S. 948

Dear Chairman Heflin:

The Natural Resources Defense Council, a non-profit membership organization with more than 130,000 members and contributors nationwide, endorses the March 6, 1990 written statement of Michael Traynor in opposition to S. 948.

Sincerely,

Johanna H Wald

Johanna H. Wald
Senior Attorney

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Traynor

Working for the Nature of Tomorrow.
NATIONAL WILDLIFE FEDERATION
1400 Sixteenth Street, N.W., Washington, D.C. 20036-2266 (202) 797-6800

March 6, 1990

The Honorable Howell Heflin
Chairman
Subcommittee on Courts and Administrative Practice
Committee on the Judiciary
United States Senate
223 Senate Hart Office Building
Washington, D.C. 20510-6282

Re: S. 948, the Ninth Circuit Court of Appeals Reorganization Act

Dear Senator Heflin:

The National Wildlife Federation, on behalf of its 5.6 million members and supporters, endorses the March 6, 1990 written statement of Michael Traynor, Chairman of the Sierra Club Legal Defense Fund, "In Opposition to S. 948 (Proposal to divide the United States Court of Appeals for the Ninth Circuit)."

Sincerely,

David Alberswerth
Director
Public Lands & Energy Division

National Audubon Society

National Capital Office 801 Pennsylvania Avenue, S.E. Washington, D.C. 20003 (202) 547-9009

March 6, 1990

The Honorable Howell Thomas Heflin, Chairman
Subcommittee on Courts and Administrative
Practice
Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Dear Senator Heflin:

Please be advised that the National Audubon Society endorses the testimony submitted on its behalf and on the behalf of other environmental and conservation organizations by Michael Traynor, Chairman of the Sierra Club Legal Defense Fund on S. 948. National Audubon is one of the largest conservation organizations with a membership of over one-half million dedicated to the protection of the environment and the wise use of natural resources. National Audubon has a litigation program with an average docket of 35 cases, most of which are before federal courts.

The National Audubon Society opposes S. 948 for the reasons set forth in Mr. Traynor's testimony. Audubon practices before the U.S. Ninth Circuit and currently has seven cases pending in that Circuit. As Mr. Traynor notes in his testimony, there is both ecological and practical logic as well as precedential value in having a single federal appellate circuit address trans-regional environmental issues.

Thank you for your consideration of these views.

Sincerely,

Hope M. Babcock
General Counsel

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SIERRA CLUB

730 Polk Street San Francisco, California 94109 415·776·2211

Michael L. Fischer
Executive Director

26 April 1990

Hon. Howell Heflin
Chairman, Subcommittee on Courts and
Administrative Practice
Committee on the Judiciary
223 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

The Sierra Club, with chapters and local groups active in every state embraced by the Ninth Circuit Court of Appeals, strongly opposes S. 948, legislation which would divide this circuit.

Our views were presented to the Subcommittee in testimony by Mr. Michael Traynor, President of the Sierra Club Legal Defense Fund, Inc.

In his letter of 26 April, Mr. Traynor responds in detail to a series of additional questions posed by you and Senator Thurmond.

The Sierra Club fully supports the points presented by Mr. Traynor in this response and again joins in urging the Subcommittee to reject S. 948.

Respectfully yours,

Michael L. Fischer
Executive Director

MLF:ld
cc: Mr. Michael Traynor, Esq.
Mr. Vawter Parker, Esq.

THE WILDERNESS SOCIETY

April 26, 1990

The Honorable Howell Heflin
United States Senate
Committee on the Judiciary
Subcommittee on Courts
  and Administrative Practice
223 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Heflin:

The Wilderness Society, on behalf of its 360,000 members, endorses the written answers provided by Michael Traynor, Chairman of the Sierra Club Legal Defense Fund, to the questions of the Subcommittee on Courts and Administrative Practice concerning S. 948.

Sincerely,

Karin P. Sheldon

Karin P. Sheldon
Vice President,
Resource Planning
  and Economics

1400 EYE STREET, N.W., WASHINGTON, D.C. 20005

APR-26-'90 10:59 ID:SIERRA CLUB LEGAL NW TEL NO:12063437340 #512 P05

Apr. 24 '90 11:15 0000 NRDC-SF TEL 415-495-5996 P. 2/ 8

Natural Resources Defense Council

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VIA FACSIMILE

April 24, 1990

Todd True, Esq.
Sierra Club Legal Defense Fund, Inc.
216 First Avenue South
Suite 330
Seattle, Washington 98104

Re: S.948 to Divide the Ninth Circuit -- Responses to
Follow-up Questions from the Subcommittee

Dear Todd:

This is to confirm that, on behalf of NRDC, I endorse Mike Trayner's responses to the questions received from the Senate Judiciary Subcommittee following its hearing on S. 948. As was the case with his original testimony which we also endorsed, we appreciate his and your work on this ill-advised legislation.

Sincerely,

Johanna

Johanna H. Wald
Senior Attorney

40 West 20th Street

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April 26, 1990

The Honorable Howell Heflin
Chairman
Subcommittee on Courts and Administrative Practice
Committee on the Judiciary
United States Senate
223 Senate Hart Office Building
Washington, D.C. 20510-6283

Re: S. 948, the Ninth Circuit Court of Appeals Reorganization Act

Dear Senator Heflin:

The National Wildlife Federation, on behalf of its 5.6 million members and supporters, endorses the written answers to the Subcommittee's supplemental questions on S. 948 submitted by Michael Traynor, Chairman of the Sierra Club Legal Defense Fund.

Sincerely,

David Alberswerth
Director
Public Lands & Energy Division

DA:jw

APR-26-'90 10:57 ID:SIERRA CLUB LEGAL NW TEL NO:12063437340 #512 P03

P.01

National Audubon Society

National Capital Office 801 Pennsylvania Avenue, S.E. Washington, D.C. 20003 (202) 547-9009

FACSIMILE TRANSMITTAL

DATE: 4/26/90

TO: Todd True

FROM: Brock Evans

NUMBER OF PAGES (including cover page): 1

COMMENTS:

You may include the National Audubon Society as an endorser of your answers to the follow-up questions on behalf of S.748.

Brock Evans

Senator **Heflin**. Our next witness is Mr. Edward Shea, Pasco, WA, of the Washington State Bar Association.

STATEMENT OF EDWARD F. SHEA

Mr. **Shea**. Thank you, Mr. Chairman. I am an immediate past member of the board of governors of our State bar, and we represent all 15,000 lawyers in the State of Washington, as our bar is a mandatory bar association. And I have been asked to speak on behalf of that association's position supporting the legislation.

There are those who criticize the State of Washington and, in particular, suggest of the State bar association that this is a recent position it has taken. Indeed, that kind of criticism reflects an ignorance of the actual historical record.

For more than 15 years and through more than 45 different lawyers on the State bar board of governors, our State bar association has, in fact, supported splitting the ninth circuit. This is not a parochial reaction to some recent environmental decision. Indeed, those lawyers, of which I am proud to say I was one, reflect the political and environmental attitudes that indeed reflect the Northwest and Washington, in particular.

It is sufficient to say that not only is the position of the bar one which antedates any such case, but like any good body, we took at look at whether or not the vitality of that position continued as recently as August 1989. And in doing so, we were privileged to have with us two distinguished jurists, Judges Browning and Fletcher of the ninth circuit, who asked to appear at our board meeting to discuss that issue with us, as well as Senator Gorton.

After hearing from two judges, both of whom we respect—indeed, Judge Fletcher was a former member of our board of governors—we continued our position in support of splitting the ninth circuit, for the reasons that I have set out in my written materials, which I ask be made part of the record.

Senator **Heflin**. It will be.

Mr. **Shea**. But, in summary, I might say that there are several points that I would like to conclude with that have been mentioned, in part, by other speakers. The rationale for our continued support of splitting the ninth circuit involves, in part, the continued problem of intracircuit conflict; that is, lack of uniformity in the decisional law within the circuit, which is one of the most difficult challenges of a large circuit.

In the ninth circuit, there are endless possibilities—over 3,000 for three-judge panels—and I think all who have visited the problem concede that intracircuit conflict exists. While a minority of lawyers and judges who were surveyed in 1987 disagree with the majority, I think that their minority position deserves some hearing here.

It was 40 percent of the judges and 31 percent of the attorneys who disagreed with the statement that the ninth circuit opinions generally adhere to the law announced in earlier opinions. Actually, a majority of the district court judges, 68 percent, and a majority of the attorneys, 59 percent of the attorneys, disagreed with the statement that there is consistency between the panels considering the same issue.

Also significant, but unmentioned heretofore, is the preponderance of unpublished dispositions which seem to hide inconsistency and compromise by the panel. It is that kind of disparity and inconsistency that leads to unpredictability, which is a major problem for lawyers and litigants.

Second, I would like to point out that the Federal Courts Study Committee also expressed its fear that the ratio of case filings per judge will inevitably be at the expense of the quality of the court's work.

The Administrative Office of U.S. Courts uses 255 cases per judge as its standard for determining an appropriate annual workload for each appellate judge. Each judge in the ninth circuit is now inundated with an average of over 467 cases per judge, according to the 1988 survey of figures. We were not able to get the 1989 figures.

Some judges complain that they are overburdened, and the Federal Courts Study Committee found that while judges' individual productivity has increased nearly sixfold, their ability to continue to increase output is near an end.

Finally, the ninth circuit has also experimented with the en banc that the Chief Justice spoke about. I agree and concur with his remarks and will not elaborate, since he did a splendid job of enunciating the difficulties with the limited en banc.

I would point out that I was a speaker at the ABA in opposition to the judges' motion. The judges did not bear the burden of persuading the ABA to favor this study. They simply wanted it to move to neutrality. There was some reference to a two-thirds vote. Indeed, it was a voice vote. It was by a bare majority, in my obviously biased opinion. We did not prevail on keeping support, but neutrality is the only issue of the ABA at the present time on this issue.

I thank you for listening to my remarks.

[The prepared statement of Mr. Shea and answers to written questions follow:]

STATEMENT BEFORE THE SENATE JUDICIARY SUBCOMMITTEE ON S. 948

March 6, 1990
Edward F. Shea
Washington State Bar Association

Good Afternoon Mr. Chairman,

I am Edward Shea and I want to thank you for the opportunity to present the position of the Washington State Bar Association in the proposed legislation to split the 9th Circuit Court of Appeals. For more than fifteen years the Washington State Bar Association has officially supported splitting the 9th Circuit into two circuit courts of appeals. And this has continued to be its position while more than forty-five different lawyers have been elected to serve on the Association's ten-member Board of Governors by the lawyers from each congressional district. That Board of Governors represents all of the lawyers in Washington state, now numbering more than 15,000.

But a position adopted years ago should be reexamined to determine if it retains its original vitality. In 1989 the Board of Governors decided to do just that regarding splitting the 9th Circuit Court of Appeals.

When we discussed this issue in August of 1989, we were fortunate to have at our Board Meeting not only United States Senator Slade Gorton, but also two distinguished jurists, Judge Browning and Judge Fletcher of the 9th Circuit, both of whom opposed the division of the Circuit. Judge Fletcher had formally been a member of the Board of Governors of the Washington State Bar Association.

After considerable discussion with the judges and the senator, our Board voted overwhelmingly to continue to support division of the 9th Circuit. The reasons for division are simple and persuasive:

(1) Conflict in the panel decision within the 9th Circuit resulting in unreliability of those panel decisions and unpredictability of those decisions for lawyers and parties.

(2) The unsatisfactory use of a modified en banc procedure defeating the basic purpose of such a procedure.

(3) An enormous work-load resulting in delay and backlog. Currently the 9th Circuit takes 4.5 months longer to make a final decision than the national average of other circuit courts.

(4) Staggering expense to transport those judges around that huge geographic region.

(5) The waste of time - where more time is spent traveling than hearing cases.

These problems have plagued the 9th Circuit since the Washington State Bar Association voted to support division of the circuit - in the years since, only one thing has changed - size! The problems have grown unimaginably larger.

Those who did not want division concede that eventually size will require division. They just say, "Not now!"

The Washington State Bar Association, having reexamined its position, renews its support for the proposed legislation. We urge this sub-committee to act quickly and favorably on this legislation.

SHEA • KUFFEL LAW FIRM
1816 North 20th • P.O. Box 2368 • Pasco, WA 99302 • (509) 545-8531 • FAX (509) 545-3019

April 25, 1990

U.S. Senate Judiciary
Subcomittee on Courts
& Administrative Practice
223 Hart SOB
Washington D.C. 20510

Dear Senator Heflin:

I am pleased on behalf of the Washington State Bar Association to respond to the questions that you have submitted in follow-up to my panel appearance before the subcommittee.

1) The necessary work of the new 12th Circuit will be considerably less as will the work of the reformed Ninth Circuit since both will have the opportunity to have cases decided by fewer panels, the opportunity to have meaningful and genuine en banc hearings to resolve intracircuit conflict in panel decisions, as well as the greater likelihood of uniformity of circuit law thereby easing the complexity for the judges in the circuit. Judicial administration itself is likely to be greatly improved and the workload of the administrators of the courts reduced, not merely divided. There will be much less complicated travel arrangements, much less complicated panel arrangements and surely a reduced number of individuals to deal with which carries with it its own internal efficiency.

I also am of the opinion that the current uncertainty of Ninth Circuit law leads to more litigation; the likelihood is that decisional law in the two circuits will be more predictable, resulting in decreased litigation, thereby reducing the workload in the two circuits.

I would add this note in this context: That if those who would continue the circuit as it exists are correct, that bigger is better and more efficient, then one would expect the recommendations of bodies studying the federal courts to conclude that there should be a merger of the present circuits into a smaller number of maxi-circuits in order to meet with the same efficient judicial administration as the Ninth Circuit enjoys. However, it is not likely that such a recommendation is now being made or will hereafter be made because it is unlikely that the

Ninth Circuit model is that efficient. It is also inevitable that the Ninth Circuit will be necessarily divided.

2) Those attending the American Bar Association Meeting perceived that this was a regional dispute among the states that comprised the Ninth Circuit and as such, a position of ABA neutrality was most appropriate and attractive to the bare majority of those in the House who voted in favor of the resolution. As you know, as long ago as 1973 the ABA favored division not only of the Ninth Circuit but of the Fifth Circuit; at that time, the issues before the ABA House of Delegates involved two significantly large regions of the country so as to make it proper for the ABA to involve itself in the matter by way of recommendation. That is now less the case when the Fifth Circuit has been divided leaving only the question of division of the Ninth and there appeared to be some conflict among the state bar associations which were represented in the House. I believe the fair inference is that the ABA thought this a matter now much more regional and much less in need of a position other than neutrality than it had formerly been and a question best left to the politics of the region. I was the lead speaker opposing the motion to change of position of the ABA and to my ear, admittedly biased, the vote in favor of neutrality was by a bare majority.

I have conferred with the current administration of the Washington State Bar Association in preparation for these answers and express the views of the association in this letter to you. In closing, I want to express my appreciation for your courtesy to all of us who appeared at the time of the hearing and for your graciousness in providing an opportunity to respond to those questions that arose after the hearing.

I look forward to hearing more of the work of the subcommittee on this issue and hope for favorable subcommittee action on the proposed legislation.

Respectfully yours,

EDWARD F. SHEA
Washington State Bar Association

EFS/es
xc:misc.'90
J.Michalik
J.Vander Stoep
Senator Gorton
Senator Adams

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April 25, 1990

U.S. Senate Judiciary
Subcomittee on Courts
& Administrative Practice
223 Hart SOB
Washington D.C. 20510

Dear Senator Thurmond:

Thank you for the opportunity to address some of your concerns regarding the proposed legislation, S.948. In responding to your inquiries, I have conferred with the present administration of the Washington State Bar Association and have its authority to act on its behalf in this response.

1) The Washington State Bar Association has among its "purposes" as contained in GR 12 of the General Rules of the Washington State Supreme Court, promotion and aid in the effective administration of justice, fostering and maintaining high standards of competence and of professionalism as well as promotion of respect and understanding for our legal system.

In carrying out its purpose to its members, it is important to examine those issues, such as the division of the Ninth Circuit, that are currently topical to determine the impact on the members of the Association and the clients of those members. The Washington State Bar Association not only examined this question as long ago as 1973 but reexamined it in the presence of Judges' Browning and Fletcher of the Ninth Circuit and Senator Gorton, at its August, 1989 meeting. After that discussion with those respected jurists and senator, the Association reaffirmed its position in support of division.

The lawyers in the state of Washington necessarily are affected by the judicial administration of the Ninth Circuit; so to are their clients. The problem of intracircuit panel conflict with resultant unpredictability of the law of the Ninth Circuit creates increased litigation because lawyers and their clients appeal in the hope of a panel favorable to their position. With a smaller circuit, there is less likelihood of intra-circuit panel conflicts and a greater likelihood of the uniformity of the law resulting in increased predictability and decreased litigation. That is effective judicial administration and as such, is a matter that the

Association should take an interest in on behalf of its members. It is also an Association action which affects the public's perception of the legal system, a matter of real and genuine interest to the Association. No other organization is as able to speak on behalf of lawyers and their clients as is the Association nor is any other organization composed of such a broad constituency so as to make certain that the position adopted by its governing body is necessarily one reflecting a broad range of interests and viewpoints. Such is the case of our Association in this matter.

The Association does believe that the competence of lawyers is directly related to the need to assimilate the law pertaining to the area in which they practice, both substantively and regionally. In the case of the two resulting circuits, the competence of lawyers in both is likely to be enhanced by virtue of the reduced volume of law to analyze resulting from the reduced number of conflicts in the panels. Further, the effective counseling of clients about their rights and the potential for their cases in the Ninth Circuit is currently a matter of some genuine concern given the intra-circuit conflicts of various panels and the modified en banc procedure. Professionalism requires lawyers to view the interests of their clients separate and apart from their self-interest, and the Washington State Bar Association has done that on behalf of its members and their clients in concluding that division is called for. Though our Association has the greatest respect for those judges in the Ninth Circuit who oppose division, the Association nevertheless believes that it's consistent with, if not mandated by, the purposes expressed in GR 12 that it take a position favoring division, given the analysis that it has made.

2. While there are many who are better informed on the issue of cost of the new Twelfth Circuit, I am familiar with some materials that indicate a cost of approximately $1.8 million which appears to be slightly more than the annual travel costs of the judges in the current Ninth Circuit. I believe the costs are more appropriately obtained from those more familiar with the costs.

3. Inter-circuit transfers are, to the extent that they create a problem, best answered not by maintaining the Ninth Circuit in its current posture, but rather by appointing the number of judges that are necessary to the circuits in question. Currently, there are unfilled vacancies at the circuit court level which, if filled, would significantly reduce, if not eliminate, the necessity for inter-circuit transfers. Admittedly, there will always be a lag-time between the perceived need for new judges and the appointment of those judges to the additional judgeships created. However, those problems are normally handled by intra-circuit transfers

during the process of recognition of the need for judges and appointment thereof. It would appear that if there is some difficulty with the mechanism of inter-circuit transfers that reform should take place in the mechanism for these transfers rather than continue the existence of a circuit whose size has made efficient judicial administration extraordinarily difficult, well beyond that of any other circuit serving any other part of the country. In short, more promptness in filling the vacancies in the various circuits and an improved mechanism for inter-circuit transfers are the appropriate means of dealing with the inter-circuit transfer problem, not the perpetuation of the Ninth Circuit in its current form with all of its current problems.

I am grateful for the opportunity to respond on behalf of the Washington State Bar Association to your concerns and hope that these answers will prove to be of assistance to you and the other members of the sub-committee in your deliberations on this most important topic. We are hopeful for favorable action by the sub-committee on the proposed legislation and look forward to hearing more on that issue. If we can be of further assistance to you or to other members of the sub-committee, we would be pleased to provide such information or responses as requested.

Respectfully yours,

EDWARD F. SHEA
Washington State Bar Association

EFS/es
xc: misc.'90
    J.Michalik
    J.Vanderstoep
    Senator Gorton
    Senator Adams

Senator HEFLIN. Mr. Mark C. Rutzick, we are happy to have you here.

STATEMENT OF MARK C. RUTZICK

Mr. RUTZICK. Thank you, Mr. Chairman. I practice law in Portland, OR. I am a member of the bar of Oregon and Washington, and most of my practice involves Federal trial and appellate litigation. Many of my clients are companies who depend on natural resources, including resources provided by Federal lands, for the supply of raw materials necessary to conduct their business operations. Federal court litigation is increasingly important to these companies.

The Oregon State Bar has not taken a position on S. 948. However, in my judgment, there is widespread support for the proposal among Federal court practitioners in my State of Oregon.

My support for the bill certainly should not be misinterpreted as criticism for any decision by the ninth circuit or criticism of the current management of the ninth circuit. To the contrary, Chief Judge Goodwin and his predecessor, Chief Judge Browning, deserve great credit for improvements that they have brought to the administration of the circuit. They have reduced delays between briefing and argument and between argument and decision.

I support the proposal for a new twelfth circuit primarily because I believe that the ninth circuit has lost the fundamental sense of regional identity which has traditionally been established and maintained by Congress in the organization of the judicial circuits.

Congress has consistently created judicial circuits comprised of a relatively small number of geographically contiguous States sharing a common historical, industrial, agricultural, and often philosophical heritage. When those traits have disappeared, Congress has changed the boundaries of the circuits, in the case of the tenth circuit in 1929, and in the case of the eleventh circuit in 1980.

Of the circuits west of the Mississippi, the ninth circuit alone remains unchanged in this century from the boundaries established by Congress long ago, in spite of the massive population growth, which now leaves between 45 and 50 million Americans in the ninth circuit, and, with 28 authorized judges and population, are more than double the average of all of the other geographical circuits in our country.

Even more so, there is a great social, cultural and industrial diversity that now exists within the circuit court to the point where I believe uniquely in the Federal appellate system today, the ninth circuit has lost any cohesive sense of regional identity.

This change is most striking to those of us who live in the Pacific Northwest region, in Oregon, Washington, Idaho, and Montana, because, by contrast, we feel there is a clear and growing sense of regional identity within our four-State region.

We are linked by the great waterways of the Columbia River and its tributaries. Congress has recognized that these waterways link the region. It has created a Pacific Northwest Power Planning Council for the express purpose of allowing major regional policy decisions to be made coherently within the region.

But, conversely, there is remarkably little contact between Oregonians and Californians and those who live in Nevada south of the Oregon border because mountains, desert, and Federal land ownership create permanent physical barriers to contact. And you really just can't get from California to Oregon very easily to do business, so there just is not much regional connection between the two States.

Certainly, the question is not whether one region is better than another, only that there are now major regional differences. An example of these regional differences is in the appreciation of the close link which exists today throughout much of the Northwest between communities and the natural resources upon which they depend for their continued existence.

There are more than 70 communities in Oregon and Washington that depend on a single sawmill for their employment and property tax base. The concept of resource dependency is basic to the social fabric of much of the Northwest, yet increasingly foreign to the millions in the metropolitan areas in California.

S. 948 gives Congress the chance to restore a sense of regional identity to the Western States. And now more than ever when the courts play the most important role ever in the history of our country in resolving public policy issues and private disputes, Congress should continue to adhere and preserve the sense of regional identity in the judicial circuits.

Thank you.

[The prepared statement of Mr. Rutzick and responses to additional questions follow:]

STATEMENT FOR THE RECORD

OF

MARK C. RUTZICK

ATTORNEY

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PORTLAND, OREGON

BEFORE THE

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE

SENATE JUDICIARY COMMITTEE

HEARING ON S. 948

NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT

MARCH 6, 1990

Mr. Chairman and Members of the Committee:

My name is Mark C. Rutzick. I practice law in Portland, Oregon as a partner in the law firm of Preston, Thorgrimson, Shidler, Gates & Ellis, a Pacific Northwest regional law firm with other offices in Seattle, Tacoma, Bellevue and Spokane, Washington, Anchorage, Alaska and Washington, D.C. I am appearing today as a member of the private bar in Oregon. I am not appearing on behalf of any client, nor am I speaking on behalf of my law firm. I am deeply privileged to have the opportunity to testify before this Committee today along with such a distinguished group of witnesses from the legislative and judicial branches of the government.

I am a member of the bar of the states of Oregon, Washington and New York, and I am admitted to practice in the United States District Courts for the District of Oregon, the Western District of Washington, and the Southern and Eastern Districts of New York; in the United States Courts of Appeals for the Ninth, Second, Fifth and Sixth Circuits; and in the Supreme Court of the United States.

My perspective on S. 948, the Ninth Circuit Court of Appeals Reorganization Act, is a product of my 16 years of practice as an attorney. After practicing law in New York City for almost five years, I spent another five years in the Civil Division of the United States Department of Justice in Washington, D.C. where as Special Litigation Counsel I traveled to every corner of the United States to represent federal agencies and officials in civil litigation matters. I relocated to Portland in 1983 as the head of the Department's Portland Field Office, and entered the private practice of law in 1986. Altogether I have appeared in more than 20 United States District Courts throughout the country, and I have argued more than 25 appeals in six federal circuits. I am also a long-time student of court administration, having authored a law review article on the subject in 1975 in the *New York University Law Review*.

As an attorney in private practice I represent a wide range of business and industrial clients in a variety of federal judicial and administrative proceedings. Many of my clients are companies in the timber and energy areas who depend on natural resources, including federally owned and managed resources, for the supply of raw materials necessary to conduct their business operations. These companies increasingly find that fundamental resource allocation decisions -- on which the future of their businesses depend -- are being made through the means of federal court litigation rather than by the federal land management agencies or Congress.

I am appearing to support S. 948. I believe S. 948 is a sound measure which will contribute significantly to improving the administration of justice in all of the Western states which are presently within the Ninth Circuit. While the Oregon State Bar has not expressed an official position on S. 948 it is my judgment that there is widespread support for the bill among the practicing bar in my state.

It is essential, in my view, to identify carefully what the real issues are concerning S. 948, and to state clearly what the issues are *not* with respect to this bill. Most importantly, this bill is not a product of dissatisfaction with any particular decision or group of decisions by the Ninth Circuit. Nor does this bill imply any form of criticism of the sitting judges on the Ninth Circuit, either with regard to the substance of their decisions or the current management of the circuit.

To the contrary, there is no question that under the leadership of former Chief Judge Browning and continuing under Chief Judge Goodwin, the Ninth Circuit has in recent years made a number of improvements in operating procedures which have reduced delays between briefing and oral argument, and between oral argument and decision. They deserve credit for these efforts.

My reasons for supporting S. 948 rest upon basic historical, demographic and jurisprudential considerations over which the judges of the current Ninth Circuit have no control, and which the most innovative and effective judicial management cannot overcome.

I support S. 948 because I believe that the Ninth Circuit as presently constituted has departed substantially from the fundamental concept of a circuit court of appeals contemplated by the Framers of the Constitution and the early Congresses that created the system of judicial circuits we follow today. Further, I believe that it is inevitable that existing demographic, cultural and social trends in our country will make this problem much more severe in the near future, to the disservice of all the citizens of the Western states.

Historically, the predominant guiding principle of the creation of the circuit courts of appeals has always been the fundamental concept of *regional identity*. The judicial circuits have always, without exception, been created to include, to the greatest extent possible, a relatively small number of geographically contiguous states sharing a common historical, industrial, agricultural and often philosophical heritage. In virtually every case, there has been a common sense of regional identity shared by the citizens of the states comprising a judicial circuit.

For example, the rich cultural heritage of upper New England has always been reflected clearly in the First Circuit, which today, as the smallest circuit in population and number of judges, is almost an historical anomaly. Yet no one has proposed merging the First Circuit with the Second Circuit in the name of efficient judicial administration for the simple reason that the regional identity of the First Circuit is clearly perceived to clash with the equally strong, but very different, regional identity of the Second Circuit.

The Third Circuit, in turn, reflects the longstanding attitudes, dating back in some cases before the American Revolution, of the Mid-Atlantic region. The Fourth Circuit embodies the border states of the south, the Fifth Circuit (after appropriate Congressional action in 1980) more clearly than ever reflects the mix of old and new in the deep South.

The Sixth and Seventh Circuits are organized to separate even the relatively subtle but very real differences between the first tier of states west of the Atlantic coastline region and the next tier representing the pure Midwest.

Significantly, none of the eight circuits east of the Great Plains contains more than five states, and seven of those circuits contains four or fewer states.

As the west opened last century, Congress created two judicial circuits for the then-sparsely populated western states. It created an eighth circuit containing 13 states from the Great Plains to the Rockies, and created the ninth circuit encompassing the states of the Pacific coast and nearby areas (including the then-territories of Alaska and Hawaii).

By the late 1920's westward population movement had expanded the population of the 13 states of the Eighth Circuit to almost 20 million, close to 16% of the then-population of the country of some 123 million. Congress responded to these demographic, social and cultural changes in 1929 by splitting the southwestern six states of the circuit off into a new Tenth Circuit with a total population of just six million people, less than five percent of the population of the country. Yet the new circuit enjoyed then, and continues to enjoy today, a sense of regional identity which gave it a more cohesive jurisprudence than was possible in the previous sprawling circuit. And the newly-truncated Eighth Circuit, now organized around the great agricultural expansion of the Great Plains, also enjoyed a more cohesive and uniform philosophical approach to law than was previously possible.

The previously-noted division of the Fifth Circuit and formation of the Eleventh Circuit in 1980 had the same "win-win" result: by separating two regions that had grown far apart socially, culturally, economically and philosophically, the split in the circuits allowed each of the new circuits to maintain and enhance their regional identity.

Yet as the unprecedented (and continuing) westward population shift of the American people proceeded in this century to transform the Pacific coast states, and, in particular, California from a remote, underpopulated backwater to the financial, social and cultural center of much of American life, the 19th century boundaries of the Ninth

Circuit Court of Appeals have, alone among the western circuits, remained unchanged.

There are many respects in which the Ninth Circuit Court of Appeals is unique among the judicial circuits. It is today the home for some 45 million Americans, one-sixth of the country's population. (This is, incidentally, the same proportion of population as was in the Eighth Circuit in 1929 when Congress split off the new Tenth Circuit.) The Ninth Circuit is more than 50% larger in population than any other circuit, and its population is more than double the average of the other 10 geographical circuits (excluding the District of Columbia and Federal Circuits).

In square miles, the Ninth Circuit is far larger than any other circuit. As a result, the distances lawyers and litigants are required to travel for Ninth Circuit arguments are substantially greater than elsewhere in the country. Most population centers in the Pacific Northwest are 600-1000 miles from San Francisco (and Alaska even farther), with the result that when arguments in Ninth Circuit cases are held in San Francisco, travel involves either a drive of several days or airfare now costing $650-$800.

With 28 authorized judges, the Ninth Circuit is almost twice as large as the next largest circuit (the Fifth, with 16 authorized judges). Excluding the Ninth Circuit, the average size of all the other circuits is 11.5 authorized judges.

The Ninth Circuit is also unique, to my knowledge, in its lack of a true *en banc* hearing procedure, and in its use of the mini-en *banc* hearing procedure in which six of the 28 authorized judges (a majority of the mini-*en banc* panel of 11 judges) are permitted to speak for the entire court.

The selection of a panel of 11 judges, almost exactly the average of the judges authorized for all the other circuits, to decide Ninth Circuit *en banc* cases may be telling. It may well reflect a judgment that 11 is the most workable number of judges to act collegially to resolve difficult issues of law. The decision by the Ninth Circuit that it can never bring all ~~its~~ judges together to decide a case *en banc* must surely reflect the difficulty in judicial administration created by a court the size of the current Ninth Circuit.

The size of the Court is not by itself the primary reason to support S. 948, although it is a factor. All the circuits will get bigger as the population and caseload continue to grow, and innovative judicial administration will inevitably be necessary to deal with all the difficulties that will arise. Thoughtful measures like those Judge Goodwin has introduced in the Ninth Circuit will be increasingly needed in all the circuits. At the same time, even if the population of the United States doubled (and the number of authorized circuit judges also doubled) only two other circuits would be as large as the Ninth Circuit is today. So the Ninth Circuit will continue to be far ahead of the rest of the country in problems of judicial administration for the foreseeable future.

The primary reason I support S. 948 is that I believe that today, in 1990, the population within the boundaries of the Ninth Circuit has grown so large and diverse that the circuit has completely lost any sense of the regional identity which was present in the past. Continuing population trends will only exacerbate this problem in the near future.

Regional identity has always been challenging in the Ninth Circuit, extending as it does from Canada to Mexico. Yet I believe there was a common regional identity to the Ninth Circuit based on the expansionist spirit which opened the west to settlement.

Today any semblance of regional identity in the Ninth Circuit has completely disappeared. This is most apparent to those of us in the Pacific Northwest who live in the cultural shadow of California. North of the Oregon-California border, you will find few citizens who feel a cultural, social or philosophical bond with our neighbors to the south. Indeed, many of us take pride in our efforts to prevent our region from becoming "another California." Many of us, however, welcome the opportunity to enjoy the California sunshine and culture when we visit.

The concept of region is an important and often-expressed one to many residents of the Pacific Northwest, by which I mean Oregon, Washington, Idaho and Montana. Those of us in these four states are linked by the great waterways of the Columbia River and its tributaries, which gives us a common stake in power, agricultural, recreational and flood control issues. Indeed, Congress has already recognized this unique regional link by creating the Pacific Northwest Power Planning Council, with two representatives appointed by the Governors of these four states, to develop a common energy and water management policy for the four state region.

The Oregon-California border is also unique in some important respects. The Siskiyou Mountains rise precisely at the Oregon-California border, forming a natural barrier to transportation and commerce between the two states. Also, heavy federal land ownership in southern Oregon and northern California permanently prevents any significant population growth along the border. As a result of these circumstances, the great majority of the Oregon population is separated from the great majority of the California population by a virtually impenetrable forested barrier more than 300 miles wide.

Likewise, the Oregon-Nevada border is marked by several hundred miles of desert on both sides, physically separating what little population there in Eastern Oregon from their neighbors to the south.

The result of these immutable physical barriers is that perhaps more than anywhere else in the United States there is virtually no cross-border population contact between Oregon and California or Nevada. Oregonians go their way quite independently of those in the neighboring states to the south. More importantly, Oregonians do not feel that they have much if anything in common with their neighbors to the south since there is so little actual contact with them. Conversely, however, there is a strong regional identity among citizens of the four Pacific Northwest states, which extends in great measure to Alaska as well.

The question here certainly is not whether one philosophy or attitude is "better" than another. No one is suggesting that there is anything wrong with Californians (or, for that matter, with Oregonians). The point is that there are clear social, cultural, philosophical and even jurisprudential differences between the Pacific Northwest region and California and the desert states of the southwest.

These differences have been brought home to many in the Pacific Northwest recently in terms of a basic appreciation of the close link between communities and the natural resources on which those communities rely for their continuing existence. For example, in Oregon and Washington there are some 70 communities which depend on a single sawmill for their employment base, and that sawmill in turn depends on a steady, uninterrupted supply of timber to continue its operations. In timber-dependent town after town, the 100-200 jobs in the sawmill are the only manufacturing employment in the area, in turn providing the economic engine that supports the entire economy of the town. In every one of these towns, the sawmill is the largest property tax payer in the school district, and its workers own the homes which provide much of the rest of the property tax base of the district.

The residents of these timber-dependent communities understand that without a steady and adequate supply of timber available every working day forever, their towns, and their children, have no future. This concept of *resource dependency* is basic to the social fabric of much of the Pacific Northwest.

Yet the concept of resource dependency is, frankly, quite foreign to the millions of Californians who live in the metropolitan areas of that state. They are urban dwellers who believe, as I often hear it said, that "milk comes from a store." Most Californians are simply unable to understand the concept of resource dependency because it is so totally alien to their life experience. For that matter, almost all aspects of life in the true small towns of America today are unknown and unknowable to many millions of Californians who will never have any exposure to that experience. Yet for the states of the Pacific Northwest, that experience remains central to much of the population of the region.

In short, the cultural and social gap between the booming metropolitan areas of California and small town life in the Pacific Northwest is vast, and is growing daily. And it is, to be sure, a gap in both directions, because just as large a proportion of Pacific Northwesterners find the urban California lifestyle incomprehensible as *vice versa*.

Having identified the concept of resource dependency as an example of the lack of regional identity currently existing in the Ninth Circuit, it is necessary to explain how this problem bears on the proposal to create a Seattle-based Twelfth Circuit.

Some argue that a lack of regional identity is actually beneficial to the administration of justice in a judicial circuit in that it provides judges uninfluenced by local considerations, and that is why courts of appeals are organized into multi-state circuits. This argument carries an unwarranted implication that judges sharing a regional identity with litigants are more likely to violate their oath of office by unfairly deciding cases to benefit local interests. This is a highly inappropriate suggestion that is based on a fundamental misunderstanding of the purposes of regional identity in the organization of the judicial circuits.

The argument for extra-regional appellate judges is at bottom historically ignorant, and incorrect. Congress' consistent historical adherence to the concept of regional identity in the organization of the circuits has always been to assure that all the judges in a circuit would bring to the execution of their duties a shared core of background and experience (even if not completely identical) stemming from upbringing in a region with identifiable geographical boundaries. The precise reason for Congress' careful adherence to accepted regional boundaries for the judicial circuits was to provide a sufficient measure of commonality between judges and litigants to assure that cases are decided with full appreciation of the social, economic and community impacts of important decisions.

In short, Congress has through two centuries of careful legislative crafting of judicial circuits created and continued the strong tradition of regional identity on the courts of appeals.

I believe that regional identity is just as valid a concept of judicial administration today as at any time in the history of our nation, and that it would ill-behoove Congress to ignore that tradition at a time in our nation's history when the federal courts play a more important role in the development and implementation of public policy, and in the resolution of private disputes, than ever before.

S. 948 offers Congress an opportunity to preserve and reaffirm the traditional concept of regional identity in the organization of judicial circuits which, through natural forces of growth and change in our country, has now largely disappeared from the current Ninth Circuit.

I believe a Twelfth Circuit based in Seattle will, like the creation of the Tenth Circuit in 1929 and the Eleventh Circuit in 1980, result in a "win-win" situation in which the administration of justice in both the new Twelfth Circuit and the new Ninth Circuit will benefit from a restored sense of regional identity and from the enhanced collegiality and productivity resulting from a smaller appellate bench in each circuit.

I urge the Congress to act favorably on S. 948.

Thank you for the opportunity to testify today. I would be happy to answer any questions you may have.

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OFFICE OF SENATOR HEFLIN
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April 23, 1990

Senator Howell Heflin
U.S. Senate Judiciary Subcommittee
  on Courts and Administrative Practice
223 Hart SOB
Washington, D.C. 20510

Dear Senator Heflin:

I am pleased to provide the following responses to the inquiries set forth in your letter to me of March 28, 1990 regarding S.948, the Ninth Circuit Court of Appeals Reorganization Act.

QUESTION 1: HOW DO YOU RESPOND TO THE ARGUMENT THAT THE CREATION OF MORE REGIONAL CIRCUITS WOULD NOT DIMINISH THE WORK, BUT MERELY DIVIDE IT?

It is certainly true that creating a new regional circuit in the Northwest will not diminish the total number of cases required to be decided by the federal courts of appeals. The issue is how the circuits can be structured to handle the existing and anticipated future workload most efficiently and expeditiously. Experience has taught us that in general circuits with a smaller number of judges decide cases faster than the large circuits.

An obvious example of the greater efficiency of the small circuit is the processing of a petition for rehearing with suggestion for a rehearing *en banc*. In the Ninth Circuit, such a petition is required to be considered by each of the 28 active judges. As a result, it is commonly many months before such petitions are acted on. In a smaller circuit, the petition would go to far fewer judges, and could be processed much faster. Since a petition for rehearing tolls the time for seeking Supreme Court review, delay in this step of the appellate process produces substantial delay in the termination of the entire process.

Smaller circuits also produce smaller numbers of precedents for review by the district court judges. As Chief Judge Panner of the United States District Court for the District of Oregon testified at the March 6, 1990 hearing, the district judges are increasingly burdened by the large numbers of often conflicting or inconsistent Ninth Circuit decisions on major points of law. Smaller circuits produce fewer reported decisions and reduce the burdens of the district court judges and counsel who are charged with following those precedents. Likewise, the smaller number of reported decisions also permits circuit judges to review existing precedents more expeditiously as they prepare more published opinions. This permits the appellate judges to make decisions more quickly in a smaller circuit.

QUESTION 2: AT ITS MIDWINTER MEETING, THE AMERICAN BAR ASSOCIATION'S HOUSE OF DELEGATES RESCINDED THE 1973 A.B.A. RESOLUTION WHICH SUPPORTED DIVISION OF THE NINTH CIRCUIT. WHAT ARE YOUR COMMENTS REGARDING THIS ACTION?

The American Bar Association House of Delegates now expresses no position on the proposal to create a new Twelfth Circuit. This is understandable in light of the fact that there are differences of opinion on the issue within the membership of the American Bar Association. The simplest way for the Association to resolve the conflict within its membership was to stand neutral on the issue. It is within the purview of the American Bar Association to determine on what issues it will take positions and on what issues it will remain neutral. There is no significance to attach to the fact that the ABA now chooses to stand neutral on the issue of dividing the Ninth Circuit.

Differences of opinion on S.948 were also expressed by members of the Senate at the March 6, 1990 hearing. Unlike the American Bar Association, Congress does not have the luxury of refusing to take positions on matters that come before it. It is incumbent upon the Senate, therefore, to move ahead on S.948 even though the ABA chooses not to provide guidance to it on this issue.

Thank you for providing me an opportunity to be of further assistance to the Committee on its deliberations on

Senator Howell Heflin
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S.948. Please feel free to contact me again if I can be of any further assistance to the committee.

Very truly yours,

Mark C. Rutzick

MCR:cp

Senator HEFLIN. Thank you.

The record will remain open in regard to the receipt of any comments that anyone wants to make.

There may be some written questions that would be submitted to the witnesses. If so, we would appreciate your prompt response.

The hearing is adjourned.

[Whereupon, at 4:25 p.m., the subcommittee was adjourned.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General
Washington, DC 20530

March 6, 1990

Honorable Howell Heflin
Chairman
Subcommittee on Courts and
  Administrative Practice
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on S. 948, the "Ninth Circuit Court of Appeals Reorganization Act of 1989," a bill to divide the Ninth Circuit. The Department favors enactment of S. 948 for the reasons set forth below.

The bill would create a United States Court of Appeals for the Twelfth Circuit, consisting of the states of Alaska, Hawaii, Idaho, Montana, Oregon, and Washington, as well as Guam and the Northern Mariana Islands. The new Ninth Circuit, in turn, would consist of Arizona, California, and Nevada.

Many suggestions have been made over the years to divide the Ninth Circuit.1/ Serious attention to this proposal began with the creation of a commission in 1972 to study the existing division of the federal circuits (the "Hruska Commission").2/ In December 1973, this Commission recommended that the Fifth and

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1/ In 1940, the State Bar Associations of Washington and Oregon proposed the creation of an Eleventh Circuit comprised of the four Pacific Northwest states plus the Territory of Alaska. This proposal was renewed in 1953 and was endorsed by the Judicial Council of the Ninth Circuit in 1954. The Judicial Conference Committee on the Geographic Organization of the Courts considered a similar proposal in 1963 but concluded that neither division of the Circuit nor creation of new judgeships was warranted at that time. See Judicial Council of the Ninth Circuit, Report to Congress on the Ninth Circuit's Implementation of Section 6 of the Omnibus Judgeship Act of 1978, at 9-10 (June 1982).

2/ Commission on Revision of the Federal Court Appellate System, chaired by Senator Roman L. Hruska. See Pub. L. No. 92-489, 86 Stat. 807 (1972).

Ninth Circuits each be divided into two circuits.[3/] In 1975, the Commission's second report described how a large court rendered the en banc process cumbersome and time-consuming, and made it difficult for judges to keep current with the law of the circuit.[4/] The Commission concluded that the en banc function of large courts should be limited to nine judges.[5/]

In 1978, after many years of deliberation on the proposals of the Hruska Commission and many other suggestions for splitting or reorganizing the two largest circuits, Congress put off the issue of dividing the Fifth and Ninth Circuits but provided new means for large circuits to handle their dockets. The Omnibus Judgeship Act of 1978 authorized circuits with more than 15 judges -- at that time, only the Fifth and Ninth Circuits -- to "constitute itself into administrative units" and adopt a limited en banc procedure.[6/] The Fifth Circuit organized itself into two geographical units, and its division was formalized by Congress two years later, effective October 1, 1981.[7/] The Ninth Circuit, instead, adopted the limited en banc procedure discussed more fully below. It functions as a unified court, although it has formed three administrative units, each of which included staff and facilities.

Among other considerations, one problem presented is that the sheer proportion of the appellate docket generated in the district courts in California is so large that it precludes an even division of its cases. At one point, former Chief Justice Burger argued for division into three circuits.[8/] The Hruska

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[3/] "The Geographical Boundaries of the Several Judicial Circuits: Recommendations for Change." The Commission assumed that a court of more than 15 judges was "unworkable" because of the problems of administration and the difficulty of sitting en banc to maintain the law of the circuit. Id. at 1-2, 6, 12, 21.

[4/] "Structure and Internal Procedures: Recommendations for Change," at 57-59.

[5/] Id. at 60-63.

[6/] Pub. L. No. 95-486, § 6, 92 Stat. 1633, Oct. 20, 1978, 28 U.S.C. § 41 note.

[7/] Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub L. No. 96-452, § 2, 94 Stat. 1994, Oct. 14, 1980, 28 U.S.C. § 41 note.

[8/] "9th Circuit Rejects Split; Wants Time to Experiment", National Law Journal, at 3 (March 28, 1983) (quoting Chief (continued...)

Commission recommended that the judicial districts of the State of California be divided between circuits.[9] The Department recognizes that this last proposal would cause significant problems unless diversity of citizenship jurisdiction, 28 U.S.C. § 1331, is substantially eliminated.

We do not believe that these more exotic formulations are necessary or appropriate to deal with the problems identified with the present Ninth Circuit. S. 948 takes instead the more straightforward and logical step of dividing the circuit along geographic lines by separating the northern and western states into a new circuit while keeping California and the two states most similarly situated, Arizona and Nevada, together in the new Ninth Circuit.

In the past, the question of dividing the circuit has been postponed, to see how well the court was able to handle its massive size and docket through improved management, limited en banc panels, and other techniques, as discussed below. Since the issue was last raised seriously, in 1983, five more judges have been added to the Ninth Circuit (for a total of 28), a factor that the Department believes has exacerbated the problems of management and unified control. The relentless caseload pressures since the court was enlarged in 1984 have only served to increase concerns about the workability of a circuit of the size and diversity of the Ninth Circuit. Substantial complaints have been registered that the Ninth Circuit is simply unmanageable.

Because we conclude that division of the Ninth Circuit will be needed to ensure the highest quality of justice and judicial administration to the vast territory and rapidly expanding population of the present Ninth Circuit, we believe that action on this bill is now appropriate.

The sheer size of the Ninth Circuit, even without its attendant management difficulties, argues for division. The Circuit spans nine states and two territories covering some 1.4 million square miles. The large geographic area of the Ninth Circuit necessarily increases the travel time necessary to hear

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8/(...continued)
Justice Warren E. Burger as calling the Circuit an "unmanageable administrative monstrosity" and suggesting that it be divided into three circuits).

[9] Under the Hruska Commission's proposal, the Northern and Eastern Districts of California would be joined to the northern states, while the Central and Southern Districts of California, together with Arizona and Nevada, would form a southern circuit.

appeals, thus reducing the time for research and consideration, while increasing costs to taxpayers and to clients. Travel expenses for the Ninth Circuit judges are the highest in the federal courts.

Within its vast realm, the Ninth Circuit serves a population in excess of 43.6 million people; the next largest, the Sixth Circuit, serves only 28.8 million, and all other federal circuits serve fewer than 24 million.[10] Moreover, population estimates from 1988 indicate an increase of over 17% in the Ninth Circuit's population just since the last census in 1980.[11]

With 28 authorized judgeships, the Ninth Circuit is by far the largest circuit. The next largest, the Fifth Circuit, has 16 judges, while the First Circuit has six and the Eighth and Tenth Circuits each have ten. The average number of judges in the federal circuits other than the Ninth Circuit is only twelve.

Of the 37,963 cases filed in the regional courts of appeals last year, 6,305 were filed in the Ninth Circuit -- one of every six appeals nationwide.[12] Since the court was last enlarged in 1984, the court's docket has grown by 21%.

Residents of the Northwest often have expressed a concern that the Ninth Circuit can be dominated by California cases and by California judges. The single largest source of appeals for the Ninth Circuit is the Central District of California (1,435 direct appeals out of 6,305), while the four judicial districts in the State of California supply the Ninth Circuit with nearly half of its proceedings (3,079 direct appeals from the four district courts out of 6,305).

This concern can be understood in part as a manifestation of the size of the circuit and diversity of the states (both geographic and economic) within it. In many ways, the northern and western states in the circuit differ substantially from the three southern states. At present, a judge in San Diego may be asked to decide questions involving trade disputes for the Northern Mariana Islands, thousands of miles away, or disputes involving a village in Alaska, or agricultural issues in Montana. The size and diversity of the circuit limits to a degree a judge's knowledge of the circumstances and legal practice in various areas of the circuit. Moreover, because the circuit's caseload is divided among so many different judges, it serves to limit each judge's familiarity with the law of some of the smaller states in the circuits.

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[10] Census Bureau Interim Estimates as of Dec. 1, 1988.

[11] Id.

[12] Annual Report of the Director of the Administrative Office of the United States Courts, for the reporting year ending June 30, 1989, Table B, at 79 (preliminary print).

The large number of judges also gives rise to a much more serious problem, that of increased inconsistency between panels within the Circuit. Three-judge panels created from the 28 judges of the Ninth Circuit increase the opportunity for conflict because of the possibility of 3,276 different combinations of panels that may decide a similar issue (not even counting the significant number of panels composed of senior judges, and judges sitting by designation).[13] In 1989, over 5,300 judge participations took place in Ninth Circuit panels. Despite computerization, the large combination of three-judge panel decisions and the sheer size of the caseload make it increasingly difficult for judges to keep abreast of other Ninth Circuit decisions in order to avoid conflicting decisions.

Because of its size, the Ninth Circuit has not utilized the traditional *en banc* procedure for resolving intracircuit conflicts. Instead, the circuit uses the "limited *en banc*" procedure for an eleven member panel consisting of the chief judge and ten randomly drawn judges.[14] Apart from any concerns over having Ninth Circuit law being decided by substantially less than a majority of the court, our past experience indicates that that the judges of the Ninth Circuit have a strong aversion to using even this limited *en banc* procedure. That leaves many cases of intracircuit conflict resolved only temporarily, if at all, by a panel.

Splitting the Ninth Circuit into two circuits would probably reduce substantially these intracircuit conflicts. Although the reorganization would be expected to increase intercircuit conflicts to a limited degree, it is preferable to have a settled "law of the circuit" on which parties could rely, than inconsistency and lack of predictability within a circuit.

The Department acknowledges that the Ninth Circuit has instituted a number of administrative innovations designed to demonstrate that the Court is manageable and capable of handling its burgeoning caseload. These procedures and techniques included dividing the circuit into three administrative regions, forming *en banc* panels of eleven judges, using bankruptcy appellate panels, deciding an increased number of cases without oral argument, and requiring pre-briefing conferences with the attorneys. To some degree, the Circuit has made progress in managing its large volume of cases despite an increasing

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13/ *See* 28 U.S.C. § 291, et seq.

14/ Ninth Cir. Local Rule 25.

appellate caseload, yet the court has not made the progress that we believe needs to be attained. The Ninth Circuit's docket still lags behind that of most other circuits, and recent statistics indicate, that the number of pending matters has increased by 5.2% since 1988, and that a backlog may again be forming, as it did in the early 1980's.[15]

Based upon the latest caseload statistics available, the district courts within the new Twelfth Circuit would generate 34% of the total appeals, while those within the new Ninth Circuit would generate 66%.[16] This suggests that 9 of the 28 judges of the present Ninth Circuit would be assigned to the Twelfth Circuit.[17]

We acknowledge, of course, that division of the Ninth Circuit will present quantitative obstacles. Even if the states of the proposed Twelfth Circuit are separated, the reconstituted Ninth Circuit still would be the largest circuit in the nation. Also, the dominant position of California in relation to the new circuit would be increased proportionately. (As indicated above, the district courts in California alone account for nearly half of the total appeals in the Ninth Circuit, over half of which are from the Central District of California.) Yet, any other attempt to deal with this imbalance must necessarily require choosing one of two alternatives, both of which present overriding concerns: the creation of a one-state circuit, or the division of California's judicial districts between two circuits. Even taking into account the imbalance in the caseload between the two proposed circuits, we believe that division of the existing Ninth Circuit would substantially relieve the problems presently associated with a court of its size, caseload, and expanse.

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[15] Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts (1981), at 100 (suspending intercircuit designation of any judges from Ninth Circuit until calendar condition improves).

[16] Based upon caseload figures for reporting year 1988, 1881 cases were filed on appeal from the district courts within the new Twelfth Circuit, and, using a proportional assignment of bankruptcy, administrative and other matters, an additional 258 cases would be attributable to that circuit. Thus, the total filings for the Twelfth Circuit would have been 2139 cases. On the other hand, 3690 appeals arise from the district courts in the Ninth Circuit, and 505 other cases would be attributable, for a total of 4195 cases.

[17] The bill would divide the 28 judges of the Ninth Circuit in regular active service between the new circuits according to place of assignment; under present circumstances, that would move 6 judges to the new Twelfth Circuit and leave 21 in the new Ninth Circuit, with one vacancy. Any imbalance in the existing distribution of judges between the circuits could readily be remedied through special transition provisions.

Finally, we acknowledge that the judges of the Ninth Circuit oppose splitting the Ninth Circuit on the grounds it would "Balkanize" the West Coast, and would not benefit the administration of justice or resolve any perceived problems. The Department notes, however, that the judges of the Fifth Circuit were similarly opposed to the bifurcation of that circuit when first proposed and that the Fifth Circuit division is considered to be a success. In our view, creating an additional circuit would not cause any significant "Balkanization" of the circuits and, in any event, would be more than outweighed by the benefits we see in dividing a court as large as the Ninth Circuit.

When the nine circuits ~~first were~~ established in their present form in the late nineteenth century, even before the circuit courts of appeals were created in 1891, the population of the United States was centered much more heavily in the East. Six circuits were established for 22 states east of the Mississippi, while the Eighth and Ninth Circuits covered 22 the states and territories west of the Mississippi. (The only other states to the west, Texas and Louisiana, were assigned to the sprawling Fifth Circuit covering the six states of the Deep South). Since then, in response to geographic and caseload problems, Congress divided the original Eighth Circuit to create the Tenth Circuit in 1929, and divided the former Fifth Circuit to create the Eleventh Circuit in 1980. In that sense, retaining vast territory and population of the Ninth Circuit in one circuit is an historical anomaly.

The Attorney General has suggested the need to consider realignment of all of the circuits to overcome the historical accidents of circuit boundaries.[18] Consideration of the restructuring of the Ninth Circuit is an important step in that process. Unlike the case of boundaries for some of the other circuits, which may make little sense if one were writing on a clean slate in present circumstances, the division of the northern and southern states in the present Ninth Circuit would make eminent good sense if the question were considered afresh.

For these reasons, the Department believes that the time has come for Congress to initiate the process of dividing the Ninth Circuit.

---

[18] Statement of the Honorable Dick Thornburgh, Attorney General of the United States, before the Federal Courts Study Committee, at 5 (Jan. 31, 1990).

The Office of Management and Budget has advised that there has no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Bruce C. Navarro

Bruce C. Navarro
Acting Assistant Attorney General

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GUAM

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March 20, 1990 LA-6

The Honorable Howell Heflin
Chairman
Subcommittee on Courts & Administrative Practice
SH-223 Hart Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find a letter from Mr. G. Patrick Civille, President of the Guam Bar Association, which I am forwarding to the Subcommittee for its consideration on S. 948. I would greatly appreciate it if the enclosed letter could be made part of the March 6, 1990 record on S. 948.

Respectfully yours,

Ben

BEN BLAZ
Member of Congress

Enclosure

Guam Bar Association
141 San Ramon Road
Agana, Guam 96910
477-7623

March 20, 1990

The Honorable Howell T. Heflin
Chairman
Subcommittee on Courts
and Administrative Practice
SH-223 Hart Senate Office Building
Washington, D.C. 20510

RE: GUAM BAR ASSOCIATION'S POSITION ON THE PROPOSED DIVISION OF THE NINTH JUDICIAL CIRCUIT

Dear Senator Heflin:

On behalf of the Guam Bar Association I am writing you to express our position regarding the proposed division of the Ninth Circuit. Guam is a small jurisdiction at the farthest reaches of the Ninth Circuit. Because of our small size and geographical isolation our Association is deeply concerned that the best interests of Guam have been overlooked in Senate Bill 948.

GUAM SHOULD STAY IN THE NINTH CIRCUIT

A recent poll of our membership has elicited overwhelming support for the proposition that, if the Ninth Circuit is to be divided, Guam should remain in the Ninth Circuit. To this end, we respectfully urge your subcommittee to amend Section 5 of Senate Bill 948 to provide that Guam remain with California in the new ninth circuit.

Guam is uniquely constituted in that much of Guam's statutory law was taken nearly verbatim from the California Codes in the early 1930's. In the ensuing decades Guam has continued to rely heavily upon California for much of its statutory framework. Because of this, decisional law from the California appellate courts and supreme court have a particular significance for Guam. Under the Ninth Circuit's decision of Roberto v. Aguon, 519 F.2d 754 (9th Cir., 1975) California case law in certain circumstances is controlling legal authority in the interpretation of Guam's statutes and, in other circumstances, is to be relied upon as persuasive authority. Accordingly, the interpretation of California case law plays a pivotal role in the interpretation of many of the laws of Guam.

The Honorable Howell T. Heflin
Chairman
Subcommittee on Courts
  and Administrative Practice
March 20, 1990
Page 2

Guam's close reliance on California statutory and decisional law distinguishes Guam from Alaska and Hawaii (two other distant jurisdictions which under Bill 948 would be transferred to the Twelfth Circuit). While the development of law in Alaska and Hawaii might not be effected by a transfer of those jurisdictions to the Twelfth Circuit, Guam's historically close association with California suggests that removing Guam from the Ninth Circuit would not be in the best interest of our territory.

The Ninth Circuit is headquartered in California and there is a pool of Ninth Circuit judges who are particularly well versed in the interpretation of California law. Just as the judges of the Ninth Circuit are the most qualified to adjudicate California law so to are they the most qualified to adjudicate Guam law. This expertise provides a measure of much needed continuity to the deveopment of the law of Guam and affords us the stability ("predictableness") needed to guide us in our endeavors. We fear a transfer to the Twelfth Circuit would jeopardize these virtues.

On many different levels Guam's ties to the mainland are primarily through the state of California. In the area of jurisprudence Guam has developed a sense of belonging in the Ninth Circuit. We enjoy the comfort and security of knowing where our law has come from and that it is being interpreted by judges who (although not from Guam) are thoroughly familiar with California and hence Guam law. While the present arrangement is not without its shortcomings, our membership feels it is far preferable to being transferred to the Twelfth Circuit. Inclusion in the Twelfth Circuit would remove Guam even farther from its roots and separate us from a source of stability and contact with the mainland United States that has served Guam well for over fifty years.

For these reasons and the reasons presented your subcommittee by the written testimony of William Blair, Esq., David Mair, Esq., we strongly urge that the subcommittee agree to leave Guam in the Ninth Circuit.

The Honorable Howell T. Heflin
Chairman
Subcommittee on Courts
  and Administrative Practice
March 20, 1990
Page 3

DIVISION OF NINTH CIRCUIT INTO TWO SEPARATE CIRCUITS

The larger issue of whether the Ninth Circuit should be divided into two is not as compelling an issue on Guam as it is on the mainland. Our membership was evenly divided on this question with some members expressing the opinion that the Ninth Circuit has simply grown too large to be administratively effective, while other members countered with the opinion that the Ninth Circuit was being divided as a method of diluting the strong pro-conservation position which has developed in the Ninth Circuit.

We realize that these larger issues are being bitterly contested and we are not in a position to add to that debate. We do hope, however, that the bitterness of the fight will not obscure what we believe should be perceived as a noncontroversial, nonpartisan request that is in the best interest of the people of the Territory of Guam.

Thank you for your consideration.

Respectfully,

GUAM BAR ASSOCIATION

G. Patrick Civille
President

GPC/vcm
[illegible]
[illegible]

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HUMAN SERVICES

March 20, 1990 LA-6

The Honorable Howell Heflin
Chairman
Subcommittee on Courts & Administrative Practice
SH-223 Hart Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find a letter from the Honorable Francisco R. Santos, Chairman, Committee on Federal, Foreign and Legal Affairs, Twentieth Guam Legislature, which I am forwarding to the Subcommittee for its consideration on S. 948. I would greatly appreciate it if the enclosed letter could be made part of the March 6, 1990 record on S. 948.

Respectfully yours,

Ben
BEN BLAZ
Member of Congress

Enclosure

COMMITTEE ON FEDERAL, FOREIGN AND LEGAL AFFAIRS
TWENTIETH GUAM LEGISLATURE
163 Chalan Santo Papa
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Senator Francisco R. Santos
Chairman

Tel: (671) 472-3414/3415
Fax: (671) 477-3048

March 19, 1990

The Honorable Howell T. Heflin
Chairman
SubCommittee o Courts & Administrative Practice
SH-223 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman,

By way of introduction, I am Senator Francisco R. Santos, Chairman of the Guam Legislature's Committee on Federal, Foreign and Legal Affairs and Vice Chairman of the Committee on the Judiciary and Criminal Justice. I have been a member of the Guam Legislature for the last ten two-year terms and have been involved in its Committee's with oversight responsibilities for matters pertaining to the courts and legal affairs. In this sense and capacity, I am seriously concerned about the jurisdictional placement of Guam in the schema of appellate courts. I am therefore requesting that this correspondence be placed on record as my official testimony on the matter of dividing the Ninth Judicial Circuit and the placement of Guam as a result of such division.

I fully understand the rationale behind the move to divide the Ninth Judicial Circuit and as Guam is in said jurisdiction, in my official capacity I fully endorse the move the divide the Circuit in order to improve case handling capabilities by lessening the case load and backlogs. As noted, Guam is affected by the caseload of the Ninth Circuit and there have been instances when important local judicial ad legislative decisions have had to be held in abeyance simply because a decision of the Ninth Circuit, would have bearing. Division of the Ninth Circuit to improve the case handling capabilities by decreasing the caseload would have been beneficial in these cases and, undoubtedly, will be beneficial in the future in similar situations.

However, I am concerned about the placement of Guam in the newly created Twelfth Circuit. My concerns center around several points which I am hopeful and confident your Committee will take into consideration during its deliberations:

1. Guam laws are, for the most part, patterned after the laws and statutes of the state of California. In many instances, Guam laws are duplications of the statutes of that state. As such, continued placement of Guam under the jurisdiction of the Ninth Circuit would ensure the consideration of appeals in the same general context which would provide some modicum of efficiency in the decision making process.

2. The Ninth Circuit already has a wide range of appellate decisions made on cases referred to it from Guam's judicial system. This again would provide some level of the desired efficiency in handling caseloads.

3. Though I would never question the ability of appellate judges appointed to the Twelfth Circuit to make fair and equitable decisions, I do think that because of the existing experience of the Ninth Circuit judges with Guam cases, their overall ability to make timely decisions on Guam questions is enhanced. I state this basically in consideration of the realm of questions which arise relative to the applicability of certain U.S laws to Guam. As you and your Committee members are undoubtedly aware Guam is an unincorporated territory of the United States and there are instances where application and applicability of laws, as well as, provisions of the U.S. Constitution, Federal statutes and even decisions of the Supreme Court may be subject to question. The existing experience of the Ninth Circuit in this sense is undeniable and must be considered an asset not easily replaced or transferred.

4. Guam is presently moving towards a new political relationship with the United States. As such, Guam's Commonwealth Act may contain provisions which would be subject to appeals to the higher courts. The Ninth Circuits experience in dealing with Guam issues would be an asset and invaluable in this consideration. Similarly, with the establishment of a new Constitution for Guam, to be constructed upon enactment of the Guam Commonwealth Act, the possibilities and probabilities that cases will be referred to higher courts cannot be denied. Again, the Ninth Circuit's experience in dealing with matters, issues

and cases pertaining to Guam and Guam's status as a territory and possession of the U.S. will prove helpful and beneficial, not only to Guam, but to the process of judicial review.

In light of these points, I am herewith recommending and requesting, upon division of the Ninth Circuit, if in fact, such a division is to be mandated, that Guam be kept under the jurisdiction of the Ninth Circuit rather than transferred to the Twelfth Circuit as is being recommended or planned in legislation now being considered by your Committee. I note that the Ninth Circuit will retain jurisdiction over the states of California, Arizona and Nevada. Because of the relatively small size and population of Guam, as compared to these three states, and granting that such is reflective of the possible caseloads which would be referred to the appellate court, I sincerely feel that retaining Guam in the Ninth Circuit's jurisdiction would not unreasonably add to the Ninth Circuit's caseload and would not detract in any manner its ability to efficiency, fairly and justly consider appeals from these three states.

Because Guam's political structure, i.e., its political relationship with the U.S., is and will be in a continuous state of flux for the next few years, I am of the opinion that such actions as that envisioned with the division of the Ninth Circuit will not be conducive to the most effective restructuring of the legal relationship that must commensurately proceed and will be an attendant complication of the change in political status and the ultimate relationship in the judicial and legal realm. Again, and for this reason, I am recommending and requesting that jurisdiction over Guam be retained in the Ninth Circuit. As Vice Chairman of Guam's Commission on Self-Determination, the body mandated to pursue the restructuring of Guam's ultimate political relationship with the United States, this matter is of great concern to me, as well as, to the other members of the Commission and the Commission itself.

In closing I would like to sincerely thank you, in our vernacular, a heartfelt Si Yu'os Ma'ase, for considering these points. I further extend my gratitude and appreciation for your decision to keep the record open, extend the time for submission of testimony and for accepting this correspondence as my official position on this matter of great importance to the people of Guam. If there are any questions whatsoever, please do not hesitate to contact me either through the mail, by phone or through our telefacsimile number noted on this letter head.

Sincerely yours,

F.R. Santos

cc: The Honorable Ben G. Blaz
Guam's Delegate to the Congress

The Honorable Joseph F. Ada
Governor of Guam

The Honorable Joe T. San Agustin
Speaker
Twentieth Guam Legislature

The Honorable Cristobal C. Duenas
Presiding Judge
Federal District Court of Guam

The Honorable Alberto C. Lamorena III
Presiding Judge
Superior Court of Guam

The Honorable Pilar C. Lujan
Chairperson
Committee on the Judiciary and Criminal Justice
Twentieth Guam Legislature

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HUMAN SERVICES

March 20, 1990 LA-6

The Honorable Howell Heflin
Chairman
Subcommittee on Courts & Administrative Practice
SH-223 Hart Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find a letter from the Honorable Janet H. Weeks, Judge of the Superior Court of Guam, which I am forwarding to the Subcommittee for its consideration on S. 948. I would greatly appreciate it if the enclosed letter could be made part of the March 6, 1990 record on S. 948.

Respectfully yours,

Ben

BEN BLAZ
Member of Congress

Enclosure

Superior Court of Guam
Judiciary Building
110 West O'Brien Drive
Agana, Guam 96910

Chambers of
Janet Healy Weeks
Judge

March 19, 1990

The Honorable Howell T. Heflin
Chairman
Subcommittee on Courts and Administrative Practice
SH-223 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman,

Thank you for the opportunity to submit testimony on Senate Bill 948 after the hearing date of March 6, 1990. Because I was in the area on other business I was able to attend the hearing, but did so in a personal capacity without a mandate from the Court or Bar of Guam.

I emphasize that the following are therefore personal observations based on my experience of fifteen years on the trial bench of the Territory, sitting also as designated United States District Court Judge. I am also a member of the Bars of Massachusetts and Guam.

As you are aware, the Ninth Circuit Court of Appeals sits as the appellate panel, not just for our District Court, but also for our Territorial Court. Our cases are appealled first to a three-judge panel of United States District Court judges as an intermediate appellate court, then on to the Ninth Circuit, just as Guam's District Court cases are. Guam therefore has added interest in the constitution of the Circuit Court which has jurisdiction over it.

I would draw the attention of the Subcommittee to Roberto v. Aguon, 519 F.2d 754 (9th Cir. 1975) which gives special status to California cases used in the interpretation of Guam Law.

It is true that the Organic Act was changed in 1985 to permit Guam to have its own Supreme Court, but it is doubtful that it will come into existence soon.

I believe there is value in Guam's staying with California if indeed the new Circuit is created. Otherwise, the proposed Twelfth Circuit will be called upon to consider Guam laws identical to California's which the Ninth Circuit would also continue to construe. Having Guam's laws considered apart from similar California laws could result in different construction of an identical law by the Ninth and Twelfth Circuits.

Page 2

I express no opinion on the division of the Ninth Circuit, however, I do ask your consideration of my reasons for keeping Guam within California's circuit if such division is made.

Again, I speak herein for myself as a Judge of the Superior Court of Guam.

Respectfully submitted,

Janet H Weeks

JANET HEALY WEEKS

1049w

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SELECT COMMITTEE ON AGING
HUMAN SERVICES

March 26, 1990

LA-6

The Honorable Howell T. Heflin
Chairman
Subcommittee on Courts & Administrative Practice
SH-223 Hart Senate Office Building
Washington, DC 20510-6282

Dear Howell :

I just wanted to write and thank you, my friend, for giving Guam the opportunity to submit formal comment on S. 948, now pending in your committee. As you can imagine, the issue has received considerable attention in my district with an almost unanimous opinion from the legal community that Guam should remain within the jurisdiction of the Ninth Circuit Court.

Howell, because Guam does not have Senate representation, there is a sentiment that we have no impact in that body. However, I know this to be false. For example, last month Dan Inouye joined me on Guam and continues to help us in defense-related matters. In the judicial arena, you have been very helpful and you continue to show interest in Guam matters.

Finally, my friend, I would like to ask, as a personal favor, if you could allay some concerns in Guam. I would appreciate if you could drop me a line, acknowledging our collective submission of testimony and assuring me that you will do whatever you can to see that Guam is retained in the Ninth Circuit.

I realize I am making an unusual request, but I hope you understand the necessity of hearing some indication of support on Guam's request. We look to you to protect this "non-Union" member of the republic.

As always, your fellow Marine,

Ben

BEN BLAZ
Member of Congress

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February 27, 1990

BY FEDERAL EXPRESS

Senator Howell Heflin
Chairman, Subcommittee on
  Courts and Administrative Practice
Senate Judicial Committee
223 Hart Senate Office Building
Washington, D.C. 20510

Re: S.948

Dear Senator Heflin:

I understand your subcommittee is planning to receive testimony rejecting S.948, next week. As Chairman of the Lawyer Representative Coordinating Committee of the Ninth Circuit Judicial Conference, I would like to inform you of a recent vote of the lawyer representatives in opposition to this legislation, which would split the Ninth Circuit.

First let me explain who the lawyer representatives are. Each of the 15 districts throughout the Circuit elects one lawyer per active district judge to serve, in accordance with 28 U.S.C. §333, as representatives to the annual Circuit Judicial Conference and to work throughout the year with the federal courts in addressing problems of judicial administration. Typically these lawyer representatives are experienced federal practitioners who reflect a cross-section of the federal bar in each district. They come from private law firms, both large and small, including solo practices; from civil and criminal practices; and from the private and public sector. As such, they are--as Congress intended they should be--a representative voice for those who deal daily with the federal courts throughout the Circuit.

Each district annually elects a chair of the district's lawyer representatives, who in turn serves as a member of the circuit-wide Lawyer Representative Coordinating Committee (LRCC). The LRCC, as its name implies, both coordinates activities and fosters communication across districts.

Last year, both the LRCC and the lawyer representatives attending the Ninth Circuit Judicial Conference specifically debated and voted on the question of splitting the Circuit, as proposed by S.948. As you can see from the attached copy of Resolution No. 9 and the tally of votes (by both judges and lawyer representatives), the opposition to splitting the Circuit was overwhelming, with the lawyers voting 69 to 10 against S.948.

Given the nature and purpose of the lawyer representative role in the Judicial Conference, I believe the strong opposition of this group to S.948 as recently as last July is persuasive evidence of the feelings of the vast majority of federal practitioners throughout the Circuit regarding the merits of S.948.

If I can provide any further information, I shall be pleased to do so.

Very truly yours,

Raymond C. Fisher

Raymond C. Fisher
Chairman, LRCC

cc: Honorable Alfred T. Goodwin
Members of LRCC
Ninth Circuit Judicial Conference
Executive Committee
Alan I. Rothenberg, Esq.
Eric Redman, Esq.

Resolution No. 9

Opposition to Dividing the Circuit

Submitted by

Chief Judge Alfred T. Goodwin

WHEREAS, a bill is now pending in the United States Congress (S.948) to divide the Ninth Circuit, placing Alaska, Hawaii, Idaho, Montana, Oregon and Washington in a new circuit, and;

WHEREAS, members of this conference in 1982 and 1984 overwhelmingly recommended rejection of any proposal to divide the Ninth Circuit on the ground that the Ninth Circuit was functioning effectively and division would not alleviate the problems caused by burgeoning caseloads which confronted the entire federal judicial system, and;

WHEREAS, the considerations which counseled opposition to division of the Ninth Circuit in 1982 and 1984 remain true today;

NOW, THEREFORE, BE IT RESOLVED that the Ninth Circuit Judicial Conference again recommends to the United States Congress that it reject any proposal to divide the Ninth Circuit at this time.

Statement of Reasons

See S.948, Ninth Circuit Court of Appeals Reorganization Act memorandum.

TALLY, from page 3

Resolution No. 4 asks the circuit to adopt standards for evaluating the complexity of Criminal Justice Act appeals to be used as guidelines in determining waivers of maximum rates of compensation, and to permit advance approval for waivers by appointed counsel.

The vote:	PASSED				
Judges:	104	Yes	Attorneys:	72	Yes
	26	No		6	No
	8	Abstain		3	Abstain

Resolution No. 5 requests that judicial officers be paid bi-weekly instead of monthly.

The vote:	PASSED				
Judges:	78	Yes	Attorneys:	71	Yes
	58	No		7	No
	2	Abstain		3	Abstain

Resolution No. 6 urges the U.S. Judicial Conference to submit a resolution to Congress asking it to reconsider mandatory minimum sentencing statutes and to establish alternate policy that retains some flexibility in the criminal sentencing process.

The vote:	PASSED				
Judges:	117	Yes	Attorneys:	70	Yes
	18	No		10	No
	3	Abstain		1	Abstain

Resolution No. 7 asks the U.S. Judicial Conference to support legislation to require biennial circuit conferences. The vote: Resolution was TABLED by the conference for consideration by the Wiggins Committee on the Size, Structure, and Composition of the Conference.

Resolution No. 8 directs the Administrative Office of the U.S. Courts to reimburse lawyer representatives for the expense of their attending the judicial conference.

The vote:	DEFEATED				
Judges:	63	Yes	Attorneys:	52	Yes
	65	No		27	No
	5	Abstain		3	Abstain

Resolution No. 9 asks the judicial conference to recommend to the Congress that it reject any proposal to divide the Ninth Circuit.

The vote:	PASSED				
Judges:	114	Yes	Attorneys:	69	Yes
	18	No		10	No
	1	Abstain		3	Abstain

■

ABA

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EDITOR,
WASHINGTON LETTER
[illegible]

STATE LEGISLATIVE
COORDINATOR
[illegible]
ABA/net [illegible]

March 6, 1990

Honorable Howell Heflin
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Heflin:

In light of the hearing on judicial circuit division to be held on March 6, 1990, by the Judiciary Subcommittee on Courts and Administrative Practice, I am writing to clarify the position of the American Bar Association on dividing the Ninth Circuit into two circuits.

After full debate, the ABA's policy-making body, the House of Delegates, on February 13, 1990, voted to rescind its earlier policy supporting the realignment of the Ninth Circuit. The effect of this action is to return the Association to a position of neutrality on the question.

Enclosed is a copy of the resolution and report for your information and use. Please make the resolution a part of the hearing record.

Sincerely,

Robert D Evans

Robert D. Evans

RDE:dc-m
Enclosure

cc: Members, Senate Judiciary Committee

American Bar Association

Appellate Judges Conference

Report to the House of Delegates

Recommendation

Be It Resolved, That the American Bar Association hereby rescinds the resolution adopted in October, 1973 which supported realignment of the United States Circuit Court of Appeals for the Ninth Circuit.

Report

In 1973, the American Bar Association adopted the recommendation of the Special Committee on Coordination of Judicial Improvements to endorse then current proposals to divide the United States Courts of Appeals for the Fifth and Ninth Circuits. That recommendation read as follows:

> "That the American Bar Association recognizes the urgent need for and supports the realignment of the United States Court of Appeals for the Fifth Circuit and the United States Court of Appeal for the Ninth Circuit provided, however, that the Association expresses no opinion upon the four principles stated in the report or upon the report itself; and
>
> That the President of the Association or his designee be authorized to present testimony in support of the Association's position to the Commission on Revision of the Federal Court Appellate System."

This recommendation grew out of the work of the Commission on Revision of the Federal Court Appellate System (the Hruska Commission) created by Public Law 92-489; 86 Stat. 807. The Commission was established in 1972 and reported in 1973.

After the Hruska Commission Report, Congress adopted Section 6 of the Omnibus Judgeship Act of 1978 Public Law 95-486. In lieu of the Hruska Commission recommendation that Congress divide the then two largest circuits, the Fifth and the Ninth, Congress chose instead to permit circuits with fifteen or more judges to adopt experimental measures which included the creation of administrative units within the circuit and en banc review by fewer than all active circuit judges.

Pursuant to that legislation, the Fifth Circuit chose to divide, and by Act of Congress became what are now the Fifth and Eleventh Circuits. The Ninth Circuit chose the alternative of creating administrative units and utilizing limited en banc procedures.

Because Congress adopted a different plan, the Hruska Commission's proposals for division of circuits are now obsolete. In the intervening years, there have been many proposals for circuit realignment, and we have had the benefit of more than a decade of experience under the legislation Congress passed in lieu of the Hruska Commission proposals. The Appellate Judges Conference accordingly now recommends that the House of Delegates rescind its earlier resolution and not support any proposals for circuit realignment. Such proposals include S.948, introduced in 1989 by several Senators from the Pacific Northwest, which would realign the Ninth Circuit.

The 1978 Act provided that if a circuit chose the alternative of administrative units and limited en bancs, it should report periodically on its experience. The Judicial Council for the Ninth Circuit has therefore duly submitted reports to Congress chronicling its experience under the Act, the fourth of which was in July of 1989. That report in its introduction summarized the experience of the Ninth Circuit as follows:

> The court reorganized itself into three administrative units, and decentralized various administrative functions to expedite local administrative matters.
>
> The court adopted a rule creating a limited en banc court of 11 judges (the chief judge and 10 circuit judges drawn by lot for each case) to resolve panel conflicts and created numerous safeguards to prevent intracircuit conflicts from arising.
>
> The court reorganized the circuit judicial council, reducing its size from 23 to 9 -- 4 circuit judges, 4 district judges, and the chief judge of the circuit -- creating a unique partnership among appellate and trial judges devoted to improving the administration of the courts of the circuit.
>
> The court increased its judicial workload and adopted a set of innovations . . . that has boosted productivity and eliminated a large backlog of cases awaiting submission.

Fourth Biennial Report to Congress, pp. 1-2.

The report concluded:

> In 1989, the court can report that the innovations of the past decade provide a solid foundation for the continued growth of the Ninth Circuit. The circuit continues to refine the concepts it has developed over the past ten years with the hope that they may assist other circuits in confronting the challenges of a burgeoning federal caseload in the twenty-first century.

Id. at 71.

The experience of the Ninth Circuit is but one of may developments in the fifteen years which have intervened since the ABA last considered circuit realignment. Of those developments, the following are among the most significant:

1. In 1974 a circuit larger than thirteen judges was viewed as the exception. That is no longer an accurate perception. When the additional judgeships the Judicial Conference requested last year are approved, there will be five circuits with fifteen or more judges. The effect of realignment of larger circuits would therefore be far more sweeping than any envisioned in 1973.

2. Since the 70's, there has been a revolution in communications, changing the ways that judges communicate with each other and with members of the bar. These innovations include facsimile transmission, electronic mail, and computerized date bases comprising all published opinions in the country. They have profoundly affected the workings of our courts. They suggest new ways of dealing with volume that were unavailable in the 70's.

3. Creation of another circuit can only add to the number of conflicts the already crowded Supreme Court must review. Circuit splitting provides no caseload relief to the Courts of Appeals; to the contrary, it can increase the load by generating more appeals to raise a conflict between the split circuits resolvable only by the United States Supreme Court. The limited en banc procedure of the Ninth Circuit, as authorized by Congress, is a proved success and avoids adding to the Supreme Court load. By keeping that load down, the ABA supports its own 1986 resolution opposing a fourth tier court between the existing circuits and the Supreme Court.

In sum, the circumstances which led to the Special Committee on Coordination of Judicial Improvements recommendation in 1973 to support circuit realignment no longer exist. There have been many intervening, significant changes. We have the benefit of nearly twelve years of experimentation in the Ninth Circuit. The position adopted in 1973 on circuit realignment is outdated and should be rescinded. We should return to a position of neutrality on the question.

Respectfully submitted,

Judge Patrick Higginbotham

Chairperson

February, 1990
2431A

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March 6, 1990

VIA FACSIMILE
(202) 224-3149

Senator Howell T. Heflin
Chairman, Judiciary Subcommittee
on Courts and Administrative Practice
SH-223 Hart Senate Office Building
Washington, DC 20510-6282

OFFICE OF SENATOR HEFLIN
1990 MAR 12 PM 3:48

Re: Bill No. S948

Dear Senator Heflin:

I am a principal of the Agana, Guam, law firm of Klemm, Blair, Sterling & Johnson, P.C. I am a member of the Bar of the Territory of Guam. I am also a member of the State Bar of California, as well as the bars of the Commonwealth of the Northern Mariana Islands, the Republic of Palau and the Federated States of Micronesia. I was president of the Guam Bar Association from 1986 to 1988, and still serve as a member of its Board of Governors.

I am submitting this letter as written testimony on Bill No. S948.

As I understand it, Bill S948 proposes to divide the Ninth Circuit Court of Appeals into two circuits. Under the proposal, the Territory of Guam, together with the other Pacific territories, would become part of the new Twelfth Circuit. California, on the other hand, would remain part of the Ninth Circuit.

I take no position on the main purpose of the bill, but I believe that, as is far too often is the case, little or no attention has been given to the ramifications of this proposal for the residents and litigants of Guam. To paraphrase something Justice Thurgood Marshall once wrote in a case arising out of Guam, this matter may at first glance seem unimportant to anyone but the residents of Guam.[1] However, putting Guam in a different circuit from California would have potentially adverse consequences on Guam litigants, and I would, therefore, strongly urge that the bill, if it is to be passed, be amended to allow Guam to remain in the Ninth Circuit together with California. My reasons are set forth hereinafter.

The main body of Guam statutory law was borrowed from California in the early 1930's. *See United States v. Johnson*, 181 F.2d 577, 580 (9th Cir. 1985); *Tabor v. Ulloa*, 323 F.2d 823, 824 n.5 (9th Cir. 1965); *Roberto v. Aguon*, 519 F.2d 754, 755 (9th Cir. 1975). Because of this, precedents established by the California appellate courts have taken on a special significance for Guam. Indeed, the Ninth Circuit has ruled that pre-adoption California decisions are controlling legal authority in the interpretation of Guam law, and that post-adoption decisions are persuasive authority. *Roberto v. Aguon*, *supra*, 519 F.2d at 755. As a result, Guam decisional law has for half a century been shaped by developments in California decisional law.

Even where there is no borrowed statute involved, Guam lawyers and judges look to California precedent more readily than to that of other jurisdictions. Many Guam lawyers subscribe to California legal reporters and own annotated copies of the California codes. This is true also of the Guam Territorial Law Library, the only public law library. The Guam Territorial Law Library has also acquired, as have many practitioners, a collection of California practitioner-oriented legal materials, including most of the publications put out by the California State Bar's Committee on Continuing Education of the Bar. These authorities and legal materials are relied upon on a daily basis in Guam by anyone interested in the law.

In short, although it is changing gradually, Guam law has a very definite California flavor.

---

[1] *See Guam v. Olsen*, 431 U.S. 195, 204, 97 S.Ct. 1774 (1977) (Justice Marshall dissenting).

Currently, all appeals from Guam, whether originating in the territorial courts or in the federal district court, go to the Ninth Circuit Court of Appeals. Even after Guam creates its own appellate court system pursuant to its authorization to do so from Congress, the Ninth Circuit will for a period of time retain the right to review, on a discretionary basis, appeals from the Guam appellate court. Thus, the Ninth Circuit will continue to be, as it has been for many years, the final arbiter of Guam law.[2]

The current appellate process for Guam is not considered completely satisfactory by anyone. Nevertheless, there is a certain amount of jurisprudence which has evolved over the years which gives guidance to Guam lawyers, judges and residents. A major aspect of that jurisprudence is that Guam lawyers can confidently look to the decisions of the California courts as aids in interpreting Guam law. This lends a certain degree of stability and predictability to our legal system. Therefore, to the extent that a federal court of appeals will continue to be the final arbiter of Guam law for an indefinite period of time, it seems not only reasonable but also logical that that court should be the same one that reviews decisions involving the interpretation of California law.

This would be consistent with what I understand is one of the principal motivations of the sponsors of the proposal to divide the Ninth Circuit, that is, to make the federal appellate courts more closely attuned and responsive to the legal and social developments in the States which comprise the appellate circuits. It would be a substantial step backward in the evolution of Guam jurisprudence for Guam to be placed in a circuit which does not regularly review California law and which could conceivably develop different interpretations of California (i.e. Guam) law than might the California courts or the Ninth Circuit and which, in any event, would be, by definition, less familiar with California law and the legal authorities on which Guam lawyers routinely rely. Guam has much in common legally with California; it has little, if anything, in common with Oregon, Washington or Alaska.

---

[2] All matters involving interpretation of Guam law are currently reviewed de novo by the Ninth Circuit. Guam v. Yang, 850 F.2d 507 (9th Cir. en banc 1988).

To conclude, I would strongly urge that, if it is to be recommended for passage to the Judiciary Committee or the whole Senate, S948 be amended to provide that Guam remain within the Ninth Circuit Court of Appeals together with California. It is difficult to conceive of any significant difference this would make to the Federal government. The administrative burden will be the same whether Guam is under the jurisdiction of a court based in San Francisco, as opposed to one in Seattle. Moreover, the appellate case load from Guam cannot be such that it would matter at all in which circuit Guam was placed. It matters a great deal, however, to the residents of Guam.

Thank you for your consideration.

Very truly yours,

William J Blair

WILLIAM J. BLAIR

cc: Honorable Ben Blaz
Guam Delegate to Congress
House of Representatives

Honorable Joseph Ada, Governor
Territory of Guam

Elizabeth Barrett-Anderson,
Attorney General of Guam

G. Patrick Civille, President
Guam Bar Association

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March 16, 1990

The Honorable Howell T. Heflin
Chairman
Subcommittee on Courts & Administrative Practice
SH-223 Hart Senate Office Building
Washington, D.C. 20510

Re: Senate Bill 948 - Division of the Ninth Circuit Into Two Circuits

Dear Senator Heflin:

To begin with, let me say that it is a pleasure to communicate with a fellow alumni of the University of Alabama. My wife, June Mair, and I received our undergraduate degrees from the University of Alabama in 1970 and we received our law degrees from the University of Alabama School of Law in 1981. My recollection is that your son graduated from the University of Alabama School of Law shortly before us.

I believe you know my Dad, Ronnie Mair, from Mobile. He is a Major in the Mobile Police Department, and he has long been a big supporter of yours. My Dad tells me that he has had the pleasure of meeting you on several occasions.

After my wife and I graduated from the University of Alabama School of Law, we moved to Guam. At first we worked in the Government of Guam Attorney General's Office, but after a short while we went into private practice. Our business has grown steadily and we are very proud of our involvement in Guam's legal community. The primary focus of our practice is in the areas of insurance defense and commercial litigation.

As a consequence of our practice focusing on the areas of insurance defense and commercial litigation, we have become quite familiar with the court system in Guam and its relationship to the Ninth Circuit. As you might imagine, we are very interested in Senate Bill 948 which proposes to divide the Ninth Circuit into two circuits, consisting of the Ninth Circuit and a newly created Twelfth Circuit.

In general, we are in favor of dividing the Ninth Circuit into two circuits. In its present condition, the Ninth Circuit is simply too large to effectively represent its constituency and render consistent decisions. However, although we are generally in favor of Senate Bill 948, we are very concerned about one particular aspect of the Bill.

It is our understanding that in its present form, Guam will be placed in the Twelfth Circuit which will consist of Guam, the CNMI, Hawaii, Alaska, Idaho, Montana, Oregon and Washington. The members of your Committee should be aware that Guam has copied the vast majority of its laws from the State of California. As a consequence, our local courts and even the Ninth Circuit have extensively relied upon California state court rulings when interpreting Guam's laws. The Ninth Circuit has even gone so far as to rule that California state court interpretations of identical statutes adopted in guam are binding precedents in this jurisdiction. Roberto v. Aguon, 519 F.2d 754 (9th Cir. 1975).

Guam's heavy reliance upon statutes that have been adopted in California has generally been beneficial to the Guam legal community. The California state court interpretations of identical statutes in Guam has allowed lawyers in Guam to predict for their clients how Guam statutes will probably be interpreted. The clients can then conduct their business affairs with some assurance that their conduct will conform with the law.

Common sense suggests that since Guam has modeled the vast majority of its statutes after statutes that exist in California, then Guam should be placed in the circuit that is most familiar with California statutes and California state court interpretations of those statutes. Obviously, the Ninth Circuit judges in San Francisco are much more familiar with California laws and precedents than the judges will be in the proposed Twelfth Circuit to be located in Seattle, Washington. For this reason, we respectfully submit that Senate Bill 948 should be revised to provide that if the Ninth Circuit is divided into two circuits, then Guam should be placed in the circuit that includes California.

Again, it has been a pleasure addressing this letter to a fellow alumni. If I can provide you with any additional information, please do not hesitate to give me a call.

Best regards,

/s/

DAVID A. MAIR

cc: Congressman Ben Blaz
G. Patrick Civille, President, Guam Bar Association

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TELEFAX MESSAGE

Date: March 20, 1990

To: The Honorable Howell T. Heflin

From: Ben C. Pangelinan

Subject: Testimony on the Legislation to Divide the Ninth Judicial Circuit.

Message:

Dear Sir:

Please enter the attached three pages as my testimony on the above subject.

If the transmission is not received in good condition, please call (671) 477-1504 or fax a message to (671) 477-1506.

Respectfully submitted,

Ben C. Pangelinan

P.O. Box 20088 Barrigada, Guam 96921 • Tel (671) 477-1504 • Fax (671) 477-1506

Ben
PANGELINAN
FOR U.S. CONGRESS
Guam First

March 20, 1990

The Honorable Howell T. Heflin
Chairman
SubCommittee on Courts & Administrative Practice
SH-223 Hart Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman,

By way of introduction, I am Ben C. Pangelinan, a private citizen of Guam and the Democratic Party of Guam candidate for the Office of Guam's Delegate to the U.S. House of Representative. I was the Democratic Party challenger to Guam's incumbent Delegate, Delegate Ben G. Blaz and despite the fact that I did not successfully unseat the incumbent Republican, I am again going to mount a challenge in this year's election. I am motivated to again seek that Office simply because I feel that Guam is not being adequately represented in important issues before the Congress. The recent effort to divide the Ninth Judicial Circuit is one such issue. I am therefore requesting that this correspondence be placed on record as my official testimony on the matter of dividing the Ninth Judicial Circuit and the placement of Guam as a result of such division.

I fully understand that the rationale behind the legislation to divide the Ninth Judicial Circuit is to improve its ability to more judiciously, more efficiently and more effectively handle the cases presented to it by its various jurisdictions. As Guam is one of those jurisdictions, the division would naturally affect the island. By design, Guam ostensibly would benefit as its cases would be heard more expeditiously. However, in matters of jurisprudence, speed must not be the primary rationale to change a system that is already working as effectively as can be expected. Many times what appears to be backlogs and case overloads actually works in favor of more prudent decisions by providing the Justices and those responsible for the necessary research adequate time to fully analyze and digest the issues before them.

Ben Pangelinan For U.S. Congress • Dave J. Santos, Treasurer, P.O. Box 3359 Agana, Guam 96910

My main concern, however, and the concern of many officials on Guam, is not necessarily related to speed and efficiency but more so with prudence, effectiveness and relativity.

In discussing this matter with many friends and associates in the legal community the following points were brought up:

1. Guam laws are, for the most part, patterned after the laws and statutes of the state of California. The Justices of the Ninth Circuit, having dealt with California and Guam law for as long as Guam as existed under its jurisdiction, are fully aware of the multitude of parameters and conditions within which these laws must function. This experience is irreplaceable.

2. The Ninth Circuit already has a wide range of appellate decisions made on cases referred to it from Guam's judicial system which make it infinitely more relative to those judicial decisions which may have to be made in the future.

3. Though I would never question the ability of any appellate judge to make fair and equitable decisions, I do think that because of the existing experience of the Ninth Circuit judges with Guam cases, their overall ability to make timely decisions on Guam questions is enhanced. Guam's present status as an unincorporated territory of the United States makes questions of law extremely tenuous and unstable. It would only seem wise that whatever stability has been created over time within the Ninth Circuit be retained.

4. The people of Guam are presently seeking to restructure the political and legal relationship of the island with the United States. Undoubtedly many issues will arise in regards to the Guam Commonwealth Act and the ensuing Guam Constitution and local legislation under that Constitution. Undoubtedly many of these issues will be tested in the higher courts. It would only seem prudent that the court with the greatest experience in this area be retained to decide on those issues, particularly those issues with overlapping because of time and subject matter.

In light of these points, I am requesting that the Committee seriously consider retaining Guam's position as a jurisdiction of the Ninth Circuit. As Guam is a small jurisdiction, I seriously doubt that its limited number of cases would cause an undue burden on the Ninth Circuit's case load. Retaining Guam with the Ninth Circuit would ensure that the most fundamental principles of American jurisprudence would be available to the people of Guam and would exhibit the stability needed over the next few years during which the island's political and legal relationship with the U.S. will be established, questioned and tested.

As Democrats we both adhere to the principles of our great party, in particular those principles which demand that the actions of government be towards the greatest good for the greatest number but also which demand that the individual rights of single citizen be equally as protected, fostered and promoted. As an advocate of the all the people, singular and in congress, I am confident that you will attend to the matter at hand with these thoughts.

In language of the Chamorro, we say Si Yu'os Ma'ase when we wish to express our appreciation and gratitude. We use the same three words of much meaning to express a sincere God Bless You for your thoughtfulness and consideration. To you, kind sir and Fellow Democrat, a most sincere Si Yu'os Ma'ase.

Sincerely yours,

Ben C. Pangelinan
Guam's Democratic Party
Candidate for Congress

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OFFICE OF SENATOR HEFLIN
1990 MAR 23 PM 2:51

March 22, 1990

Honorable Howell Heflin
Chairman
Subcommittee on Courts and
Administrative Practice
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Board of Directors of the Bar Association of San Francisco has read and considered Senate Bill 948, now before your Subcommittee. We understand that the purpose of the bill is to amend Title 28 of the United States Code to divide the Ninth Judicial Circuit of the United States into two circuits. We wish to go on record in opposition to this bill. Rather than simply repeat arguments already raised in opposition to the bill, we have focused our attention upon the letter of March 6, 1990 submitted by the Department of Justice. We understand that no organization has yet directly addressed the issues raised in that letter. We do so now.

I. INTRODUCTION.

The Justice Department's letter of March 6, 1990 to Senator Howell Heflin endorsing S. 948, the Ninth Circuit Court of Appeals Reorganization Act of 1989, is short on analysis or facts to back up the Department's support of the bill. Rather than offer its own substantive reasons why the Ninth Circuit should be divided as proposed in S. 948, the Justice Department falls back on vague generalizations and previously discredited criticisms of the court. Such justifications for supporting reorganization of a major federal court smack more of political expediency than the cogent and even-handed legal analysis we should be able to expect from our nation's top legal officials.

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The Justice Department offers three basic reasons for enacting S. 948. In each case, the Department's reasons either lack support or rely on erroneous justifications.

First, the Department argues that the court should be split because of "substantial complaints * * * that the Ninth Circuit is simply unmanageable." DOJ Letter at p. 3. The Department, however, identifies neither complaints of its own nor those of others to support this contention. Instead, it recites a number of irrelevant facts about the size of the Ninth Circuit. More importantly, there is ample evidence that the Ninth Circuit is an efficiently managed large court.

Second, the Department asserts that the Circuit should be split because the court's judges cannot appreciate the local flavor of cases arising in some of the Circuit's smaller jurisdictions. Again, the Department cites no evidence from the court's published decisions to support this contention--nor could it--the claim is simply nonsense.

Finally, Justice argues that the court should be split to reduce the number of conflicting decisions that the court now issues. The Department provides no examples of such conflict and ignores an empirical study of the court's published opinions which did not find a noticeable problem of conflicting rulings.

We provide a more detailed discussion of each of these points below. In short, however, the Justice Department offers no persuasive reasons to enact S. 948. Instead, the best evidence and the most compelling analysis leads to the conclusion that S. 948 is as unnecessary as it would be unwise.

A. Contrary to the Justice Department's Argument, the Ninth Circuit is Not "Unmanageable."

The Justice Department, without reference to any supporting materials, asserts that there have been substantial complaints that the Ninth Circuit is unmanageable. DOJ Letter at p. 3. It then proceeds to offer a number of facts about the court's size, apparently to substantiate its claim of unmanageability. The facts it offers, however, do not support its claim.

For example, Justice notes that the Ninth Circuit encompasses nine states, two territories and some 1.4 million square miles. It then concludes that this vast area "increases the travel time necessary to hear appeals, thus reducing the time for research and consideration" of cases. DOJ Letter at pp. 3-4. As the Chief Judge of the Ninth Circuit recently observed, however:

> "A normal panel assignment [that requires a judge to travel] usually involves about two hours combined in the air and in the airports each way for a 20 to 30-hour stint on the bench. Most judges read case materials during flying time. Many judges spend more time commuting on freeways at home during a week in chambers." Statement of Alfred T. Goodwin Before the Senate Judiciary Subcommittee at p. 5 (March 6, 1990).

Thus the Justice Department's glib reasons for asserting that the Ninth Circuit is unmanageable fail to withstand practical considerations.

Similarly, Justice offers facts about population size, number of judges and number of cases in the Ninth Circuit as evidence of the court's unmanageability. DOJ Letter at p. 4. None of these statistics are even relevant. Regardless of the absolute number of judges or cases, manageability is best determined by examining the court's efficiency and effectiveness in disposing of the cases brought to it.

On these points, the Ninth Circuit has an outstanding record. The court disposes of approximately 2,500 cases each year that survive procedural dismissals and abandonment. Before the October 17, 1989 earthquake in San Francisco, the court was hearing argument in these cases promptly after the parties filed their last brief. Goodwin Statement at pp. 3-4. Moreover, among the 11 federal circuits, cases filed in the Ninth Circuit spend the fourth shortest amount of time in the judges' chambers between argument and disposition. See The Judicial Council of the Ninth Circuit, Fourth Biennial Report to Congress on the Implementation of Section 6 of the Omnibus Judgeship Act of 1978 at p. 28 (July 1989).

The court has achieved this record of efficiency by aggressively pursuing innovation in its docket management. Indeed, the Federal Courts Study Committee, commissioned by Congress in 1989, has concluded that large circuits, following the Ninth Circuit's model and using modern technology with adequate staff support, offer a better answer to the continuing growth of judicial business than would expansion of the number of federal circuits. The Federal Courts Study Committee, Tentative Recommendations For Public Comment, December 22, 1989, p. 115.

In sum, rather than revealing a picture of unmanageability as the Justice Department asserts, the court's record in managing its docket demonstrates both innovation and efficiency--neither reasons for dividing the circuit.

B. There is No Evidence That the Ninth Circuit is Dominated by Judges From One Region Unfamiliar With the Local Character of Other Areas of the Circuit.

The Justice Department joins the sponsors of S. 948 in perceiving regional bias and blind spots within the Ninth Circuit. DOJ Letter at pp. 4-5. This perception lacks evidentiary support and rests on a misunderstanding of the appellate court's role.

No survey of Ninth Circuit decisions has ever uncovered an identifiable regional bias in the court's decisions, nor does the Justice Department offer such evidence. Indeed, a survey of the court's recent decisions by the Sierra Club Legal Defense Fund which reviewed the court's published opinions on environmental matters over the last four years, failed to find any discernable regional pattern in the court's decisions in this field. See Statement of Michael Traynor Before Senate Judiciary Subcommittee at pp. 6-8 (March 6, 1990). The Legal Defense Fund survey specifically addressed the claim by some supporters of S. 948 that California Ninth Circuit judges are imposing their views of environmental law on the Northwest states that would comprise the new twelfth circuit. The survey disclosed, however, that in the last four years only one Northwest Circuit Judge has filed a dissent in an environmental case--and the other two judges that heard and decided the case for the majority also were from the Northwest. This hardly constitutes evidence of regional dominance or ignorance of local conditions.

More importantly, the argument that the Ninth Circuit has failed to decide cases consistent with local facts and circumstances rests on a misunderstanding of the court's role. To the extent that a "regional milieu" is relevant to the legal issues in a case, it is the responsibility of the attorneys to develop, in the local trial court, a record for appeal that reflects these facts. The appellate court then reviews the facts brought to it and articulates rules of law which should, to the greatest extent possible, apply consistently throughout the court's jurisdiction. It is simply not the job of the Ninth Circuit to develop local rules of federal law for a particular region.

The Justice Department's unsupported and erroneous claims of regional dominance or local ignorance among the Ninth Circuit judges thus provide no basis for dividing the court.

C. Conflict Among the Decisions of the Ninth Circuit is Not a Serious Problem.

The Justice Department's final reasons for supporting S. 948 is that "[t]he large number of judges [on the Ninth Circuit has] increased inconsistency between panels within the Circuit." DOJ Letter at p. 5. It then notes that with 28 active judges there are 3,276 possible three-judge panel combinations and that in 1989 there were "over 9300 judge participations * * * in Ninth Circuit panels." Id. Again, the Department's recitation of sheer numbers does not establish its claim of inconsistency among panel decisions. Nor does the Department make any attempt to support its claim with the only possible relevant evidence--examples of inconsistency.

In fact, the only empirical study of Ninth Circuit decisions that has attempted to examine their internal consistency concluded that there was no serious consistency problem in the Ninth Circuit. Professor Arthur D. Hellman from the University of Pittsburgh Law School studied Ninth Circuit panel decisions in 1983 and concluded that intracircuit conflict is not as much of a problem as it is sometimes thought to be. Instead, the perception of a problem has been created by isolated examples of conflict among decisions in a few highly-visibility cases. See Hellman, Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court, 56 U.Chi.L.Rev. 541 (1989). Professor Hellman has recently completed another study of conflicts among more recent Circuit decisions for his forthcoming book, Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts (Cornell Univ. Press, forthcoming 1990). That study too confirms the absence of a serious intracircuit conflict problem. Statement of Arthur Hellman Before the Senate Judiciary Subcommittee at p. 8 (March 6, 1990).

Even if conflicts among the decisions of the Ninth Circuit were the prevalent problem that the Justice Department suggests, as the Department implicitly acknowledges, there are effective means for resolving the problem--chiefly more frequent use of the court's en banc hearing procedures--that are far less expensive and drastic than dividing the Circuit. See DOJ Letter at p. 5.

As with its other reasons for supporting S. 948, the Justice Department's final reason, the existence of intracircuit conflicts, simply cannot withstand a close examination.

II. CONCLUSION.

The U.S. Department of Justice has taken the strong step of actively supporting S. 948 and its goal of dividing the Ninth Circuit Court of Appeals. Intervention by the Justice Department in the debate over the future of this important federal court should shed unbiased and helpful light on the serious issues surrounding the proper administration and management of this Court. Unfortunately, the Department has failed to offer any insight with its endorsement of S. 948. Instead, it relies on superficial and previously discredited reasons for splitting the Circuit and it fails to support even these inadequate reasons with its own evidence or analysis. Under these circumstances, the Department's support of S. 948 should be disregarded.

Instead, the persuasive reasons for maintaining the integrity and unity of the existing

Ninth Circuit offered by its judges, numerous legislators and many of the affected bar associations across the Ninth Circuit should be heeded and S. 948 rejected.

Respectfully submitted,

The Board of Directors
of the
Bar Association of
San Francisco

By Michael C. W. Lee

Alliance for Justice

A National Association of Organizations Working for Equal Justice

1601 Connecticut Avenue, N.W. Suite 600 ■ Washington, D.C. 20009 ■ 202/332-3224

NAN ARON
Executive Director

FRANCES DUBROWSKI
Chair

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March 29, 1990

The Honorable Joseph Biden
Chairman, Committee on the Judiciary
The Honorable Howell Heflin
Chairman, Subcommittee on the Courts
and Administrative Practice
United States Senate
224 Dirksen Office Building
Washington, D.C. 20510

Dear Chairman Biden and Senator Heflin:

On behalf of its members, the Alliance for Justice wishes to express its opposition to S. 948, the "Ninth Circuit Court of Appeals Reorganization Act," which would reduce the 9th Circuit to cover the states of Arizona, California and Nevada, and create a new circuit composed of Alaska, Hawaii, Idaho, Montana, Oregon, Washington and the Pacific Territories. The legislation, which is an attempt to tamper with the federal court system for political reasons, is unnecessary and misguided.

The ostensible purpose behind S. 948 is to increase the efficiency of the circuit's case management by reducing the backlog of cases and bring uniformity to the interpretation of federal laws. However, the bill will only shift judges and cases to a new circuit; it contains no provision for alleviating the backlog. Moreover, splitting the 9th Circuit would inevitably create even more conflicts in interpretation than already exist between circuits, by adding yet another circuit's voice.

According to Chief Judge Alfred Goodwin, the 9th Circuit has already instituted innovations to resolve intracircuit problems, such as using en banc panels of 11 judges. In fact, Judge Goodwin recently stated that "the court can report that the innovations of the past decade provide a solid foundation for the continued growth of the Ninth Circuit." In addition, the Federal Courts Study Committee has tentatively concluded that the 9th Circuit, as it exists now, may actually be the model for federal appeals courts.

The real purpose behind S. 948 is forum creating, because forum shopping has apparently failed the resource-development interests of the Upper Northwest, which see the San Francisco-based 9th Circuit as unfriendly to their claims. That sentiment was reflected in a statement by one of the bill's sponsors that the 9th Circuit is dominated by "California attitudes". If Senators are dissatisfied with decisions relating to the environment, then the appropriate forum from which to seek relief is Congress. Restructuring the court system is not warranted.

Long concerned with the integrity of the federal courts, the Alliance believes that splitting the 9th Circuit under these circumstances would establish a harmful precedent. It would invite other interests to tamper with the federal court system when they are dissatisfied with the decisions rendered, rather than seek redress more appropriately through substantive changes by Congress.

Finally, it should be noted that nearly every appellate and district court judge in the 9th Circuit, including its chief judge, and bar organizations in Arizona, California, Hawaii, Montana and Nevada oppose the proposed reorganization. We urge you not to report this legislation.

Sincerely,

Nan Aron

NAN ARON
Executive Director

BOGLE & GATES

LAW OFFICES

RICHARD M. CLINTON

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Anchorage
Bellevue
Portland
Tacoma
Washington, DC
Yakima

February 26, 1990

VIA FEDERAL EXPRESS

The Honorable Slade Gorton
SH-730 Hart Senate
Office Building
Washington, D.C. 20510-4701

Re: Ninth Circuit Court of Appeals
Reorganization Act of 1989

Dear Senator Gorton:

As you know, I am a litigation partner with the Seattle law firm of Bogle & Gates and have specialized in litigation since 1967. I am a Fellow of the American College of Trial Lawyers and a past president of the Federal Bar Association for the Western District of Washington. As a practicing lawyer from the State of Washington, I am in favor of splitting the Ninth Circuit for the following reasons:

1. The large number of Ninth Circuit judges and the even greater number of panels that sit in the Ninth Circuit often make it very difficult to predict the likely outcome of litigation for clients. Unpredictability is frustrating to lawyers and clients, encourages litigation, and fosters disrespect for the law. In the Ninth Circuit, lawyers must often advise their clients that they cannot begin to predict the likely outcome of an appeal until the panel is identified. Unpredictability encourages litigation because clients are often willing to litigate and appeal if there is not a clear answer. At the same time, those who would criticize the law as being wrongly dependent on who the decision-maker is, rather than on principle, can point to this unpredictability as substantial support. A smaller circuit in my opinion would increase predictability, reduce the incentive to litigate, and engender heightened respect for the law as an institution.

2. The many cases and large body of law the Ninth Circuit generates not only makes predictability difficult, but also increases the costs of researching and analyzing the large body of Ninth Circuit law. For example, different panels of the

Circuit issue opinions on the same subject that vary. To research the questions they address, each opinion must be assessed.

3. The Northwestern part of the United States has been growing in population, with a resulting growth in litigation. This growing region has a number of legal issues that are different from other parts of the country, such as the Southwest, which now falls within the Ninth Circuit. For example, there are complex fishing, natural resource, energy, trade, and other Northwest issues. A reduced number of judges in a smaller circuit should be able to become more familiar with these regional issues. They should also be more capable, where appropriate, of applying local state law, as they would work with that law much more consistently.

4. One would hope that a smaller Circuit would be composed of current Ninth Circuit judges from this region. This is very desireable. Clients and lawyers are usually more comfortable with judges who come from their region of the country. This is in significant part because, as noted above, the judges are likely to be more familiar with the regional issues and presumably be able to handle those issues more readily. This should increase the predictability of their likely decisions, and, in turn, is likely to reduce the amount of litigation.

5. The present Ninth Circuit is extremely large in population, geographic area, judicial workload, and number of judges. In my opinion, and, I believe, in the opinion of many lawyers and clients, bigger is not necessarily better. Splitting the Circuit is likely to decrease the case backlog, reduce bureaucracy, reduce costs, and increase efficiency. In addition, a smaller circuit is likely to create greater collegiality among the judges and between the judges and lawyers. This should work to facilitate consensus in legal decision-making, and therefore lead to a more coherent body of circuit precedent. Finally, litigants are likely to be more comfortable with and receptive to a more local court of appeals.

I hope these comments are helpful. Please contact me if I can be of any further assistance.

Very truly yours,

BOGLE & GATES

Dick Clinton

Richard M. Clinton

STATEMENT OF CONGRESSMAN BEN BLAZ

RELATIVE TO S. 948

Before the Senate Subcommittee on Courts & Administrative Practice

March 20, 1990

I wish to thank you, Mr. Chairman, for giving me this opportunity to comment on S. 948. This bill is of particular interest to my district since it proposes to shift appellate jurisdiction for Guam out of the Ninth Circuit and place it (along with Alaska, Idaho, Montana, Oregon, Washington, Hawaii and the Northern Mariana Islands) in a newly created Twelfth Circuit to be based in the State of Washington.

Mr. Chairman, S. 948 raises two questions with respect to Guam: the advisability of splitting the Court, and, whether appellate jurisdiction for Guam should continue to rest with the California-based Ninth Circuit.

As to the first question, there is little doubt something must be done to ease the tremendous case load presently burdening the Court. As the busiest Circuit in the country, the Court's resources are clearly overtaxed. Therefore, the solution appears to be to either increase the number of judges, or, as S. 948 proposes, create another Circuit - thus relieving the court calendar and expediting the appellate process.

My concern with S. 948 revolves around the issue of placing Guam within the confines of a Washington-based Twelfth Circuit. Mr. Chairman, the California-based Ninth Circuit has exercised appellate jurisdiction over Guam since 1950 when the island ceased to be a United States Naval possession. Moreover, Guam ties to California statutes predate passage of the Organic Act which gave Guam its measure of self-government. As early as the 1930s, Naval Governors promulgated laws based on California codes. Following passage of the Organic Act in 1950, the Guam Legislature regularly enacted legislation based on California legal authorities and precedents. So close are the ties between Guam and California, in fact, that the Ninth Circuit itself has ruled (in Roberto v. Aguon) that California decisions are controlling legal authority in the interpretation of Guam law, and that post-adoptive decisions are persuasive authority.

Mr. Chairman, it is the unanimous consensus of members of Guam's legal community who have submitted testimony to this subcommittee that should the Court be divided, jurisdiction for Guam appeals continue to rest in a California-based circuit. In a recent letter to me, Guam Bar Association President G. Patrick Civille was to note:

> "As you probably can appreciate, it is unusual for the members of our Association to express to a strong unity on any single issue. From the comments which I have received, it is clear that the passion which our membership feels on this issue is in large measure attributable to the close historical connection between Guam's statutory framework and the laws of California."

This opinion is also shared by the Presiding Judge of the Superior Court of Guam and the Chairman of the Legislature's Committee on Federal, Foreign and Legal Affairs, both of whom I met with on a recent trip to my district.

Finally, it must also be pointed out that Guam is presently seeking a change in its political relationship with the United States. I mention this, Mr. Chairman, because as one of the cosponsors of the Guam Commonwealth Act, you are aware of Guam's unique circumstances. As discussions between the Federal Government and Guam's Commission on Self Determination continue, it is believed inadvisable to "change horses in midstream" by placing appellate jurisdiction for Guam in a Circuit whose interpretation of California/Guam statutes and precedents may materially differ.

In conclusion, Mr. Chairman, I respectfully request that should this subcommittee report out S. 948, it afford the people of Guam the same choice as it did our Hawaiian neighbor, and amend the bill to retain Guam within the jurisdiction of the California-based Ninth Circuit.

Thank you for your kind consideration in this matter.

TESTIMONY OF
KENNETH O. EIKENBERRY
ATTORNEY GENERAL OF THE STATE OF WASHINGTON
BEFORE THE
SENATE JUDICIARY
SUBCOMMITTEE ON COURTS & ADMINISTRATIVE PRACTICE
HEARING ON S.948
NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT
TUESDAY, MARCH 6, 1990

Good Morning, I am Ken Eikenberry, Attorney General of the State of Washington.

First, I would like to express my appreciation to the Chairman and Committee for the opportunity to provide this testimony.

Also by way of introductory note, in 1989, the Western Association of Attorneys General representing all states and territories within the present Ninth Circuit considered and adopted a resolution supporting the division of the Ninth Circuit Court of Appeals. The configuration of the resultant circuits and thus the specific bill before you was not addressed, but the idea of dividing the Circuit was endorsed. Nor will my testimony address which states and territories ought be included in any reconfigured Courts of Appeals. I am confident that my general remarks supporting the concept of division and reasons for it were and are shared by other Attorneys General, and I attach a copy of the Western Attorneys General resolution to this testimony.

The impact on states of the problems I discuss is substantial, if symptomatic of impacts on all litigants. My office--the Washington Attorney General's Office--presently has about 60 cases pending in the Ninth Circuit.

The delays and other problems I discuss are multiplied with this caseload. California, I am confident, has many more, and some states far fewer pending cases. Many litigants, of course, have only one.

Some facts about the Circuit are undisputed, and impressive. As one example, the Ninth Circuit is geographically the largest of all circuits with 28 circuit judges currently comprising the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, as well as Guam and the Northern Mariana Islands. Though these are all delightful places to visit, the travel burden on the judges and litigants can be extreme. I know of no effort to quantify the costs in time and money spent travelling, except that the Ninth's travel costs are the highest of the Circuits

The Court's Reports show it receives close to one-sixth of all appeals filed nationwide. The number of pending appeals is at, or close to, the highest nationally each year. The number of "case participations" has been the highest in the country for years (cases argued or submitted on briefs times the judges participating. The latter figure is usually three--the panel size). With this workload, it is not surprising to find delay in disposing of cases.

The time between the filing of an appeal and disposition by the Ninth Circuit court averages approximately 14.7 months, the second longest period of all the circuits. This figure might also be contrasted with the national average of 10.4 months to dispose of federal appeal cases and the 6.3 months of two of the smaller circuits.

Adding more judgeships to the court, though necessary because of workloads, will not cure the problem of delay. Last year's (1989) caseload increase, reported by the Court's clerk at 15 percent, has I assume, continued to present. The only reasonable prediction is that the caseload of the present Ninth Circuit will continue to grow faster than the national average. Some Ninth Circuit states, particularly California, have been experiencing tremendous population growth in the last several years. The Ninth Circuit is not expected to accommodate the resulting caseload rise without even further delays. Thus, the course of litigation throughout all Ninth Circuit states will be adversely affected by the growing volume of cases from a few of those states.

One result of the caseload is the delay noted above.

Another result, both of caseload and geographical spread of the Ninth Circuit, are escalating costs of administration.

The Ninth Circuit costs of administration and travel are the highest in the country; costing about 20 percent of the total funding for all 13 federal circuits. These costs continue to rise.

It is very important that I duly credit the Court, its judges, clerk, and administrators for the admirable efforts to institute management techniques and docket controls to deal with an expanding and already difficult workload. I nearly referred to an "impossible" workload, but these commendable efforts by the Court have made merely "difficult" a task which to outsiders appears impossible.

Another problem caused by the size of the Circuit is a loss of collegiality and consistency within the Circuit.

Many commentators have observed the large number of judges, cases, and opinions within the Circuit which make it difficult for the Ninth Circuit to maintain consistency of law. Conflicting opinions have become more common. The Ninth Circuit is the only circuit that does not convene en banc panels of all judges to resolve such disputes. Rather, the Ninth Circuit utilizes a "Limited En Banc" procedure choosing, by lot, fewer than one-half the circuit judges to sit en banc. The resulting decisions obviously do not necessarily reflect the views of a majority of the judges.

One particular area of litigation of great sensitivity to states is federal court habeas review of criminal convictions, often occurring only after state court procedures have run their often long and tedious course.

The Ninth Circuit court's size and delays only exacerbate the problems inherent in federal habeas corpus review. That delay is especially frustrating to the states in capital cases. The federal district courts in the state of Washington have, by and large, been doing an excellent job of deciding the habeas cases before them in a timely manner. The federal district court judges in Washington state all recognize the inherently intrusive nature of federal habeas review, and go to some pains to carefully balance the rights of petitioners against the legitimate interest of the state.

That concern for the interests of timely and expeditious handling of habeas corpus matters, particularly those involving imposition of the death penalty, has not been a priority in the Ninth Circuit with its huge caseload. The Ninth Circuit, at least officially, places federal criminal appeals on a higher priority than any other cases, even higher than death penalty habeas corpus cases reviewing state convictions. Ninth Circuit Rule 34-3 places both federal criminal appeals and recalcitrant witness appeals in a higher priority than capital cases from states. This is simply not acceptable. The states have primary responsibility for law enforcement and criminal prosecutions. The public's confidence in the criminal justice system and the finality of its state court judgments is eroded when a federal court not only delays imposition of valid state criminal sentence by issuance of a stay, but when the court also fails to decide the merits of the case within any reasonable timeframe.

As noted, the Ninth Circuit's sheer size--both in number of judges and in its territorial jurisdiction--contributes to these delays. It is not unusual for a habeas corpus case to spend literally years within the Ninth Circuit. For example, in Harris v. Pulley, the court spent over one year just to decide Mr. Harris's (unsuccessful) petition for rehearing en banc. Another example, is the Washington case of Campbell v. Blodgett. In the seven years since Mr. Campbell's original conviction and death sentence, over four years have been spent by the federal courts in further habeas review. Habeas corpus review should be expedited, particularly in capital cases. A more workable federal circuit will undoubtedly assist in achieving such expedition, especially of such capital cases.

A brief note should be made of the desirability of smaller circuits to provide more familiarity of the judges with the regional issues and states laws implicated by their decisions. Very often state law issues are mixed with the federal law questions presented in federal cases. When a Circuit is so scattered and disparate as the Ninth, it is unlikely the judges will automatically have knowledge of the state issues. Add a workload which makes full researching of even federal issues difficult and the problem is obvious.

For all the above reasons, I urge you to support legislation dividing the Ninth Circuit into more manageable, more economic circuits which I sincerely believe will dispense better justice and more timely to the citizens of the affected state.

Attachment

CONFERENCE OF WESTERN ATTORNEYS GENERAL THE COUNCIL OF STATE GOVERNMENTS
121 SECOND STREET 4TH FLOOR SAN FRANCISCO, CALIFORNIA 94105 TELEPHONE (415) 974-6422

WESTERN STATES
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OREGON
UTAH
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WYOMING
PACIFIC ISLANDS
AMERICAN SAMOA
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
GUAM

RESOLUTION NO. 89-07

PROPOSED BY ATTORNEY GENERAL KENNETH O. EIKENBERRY (WA)

SUPPORTING DIVISION OF THE NINTH CIRCUIT COURT OF APPEALS

WHEREAS, the Ninth Circuit is the largest federal circuit in the country in number of judges, case load, geographical size and population; and

WHEREAS, the Commission on Revision of the Federal Court Appellate System recommended the division of both the then-Fifth Circuit and the Ninth Circuit each into two smaller circuits, however, Congress only acted to divide the Fifth Circuit; and

WHEREAS, the Ninth Circuit, in part because of its size and load, requires the longest time to dispose of cases (14.5 months versus 10.2 months national average); and

WHEREAS, the Ninth Circuit costs of administration and travel are the highest in the country; costing about twenty percent of total funding for all thirteen federal circuits which costs continue to rise. Costs for litigants also are increased by travel requirements; and

WHEREAS, many commentators have observed the large number of judges, cases and opinions within the circuit make it difficult for the Ninth Circuit to maintain consistency of law and conflicting opinions have become more common. The Ninth Circuit is the only circuit that does not convene en banc panels of all judges to resolve such disputes rather than utilizing a "Limited En Banc" procedure choosing fewer than one-half the circuit judges by lot to sit en banc; and

WHEREAS, federal circuits should be constituted so as to assure that judges hearing cases will have familiarity with regional issues and state laws which are implicated by their decisions. This can be accomplished better by dividing the Ninth Circuit.

WHEREAS, such reorganization which reconstitutes the existing Ninth Circuit into two circuits should be accomplished without splitting any one state between two circuits.

NOW, THEREFORE, BE IT RESOLVED that the Conference of Western Attorneys General supports legislation dividing the Ninth Circuit into two separate circuits; a reconstituted Ninth and a new Twelfth Circuit.

(RESOLUTION ADOPTED ON AUGUST 4 AT THE 1989 CONFERENCE OF WESTERN ATTORNEYS GENERAL ANNUAL MEETING IN JACKSON, WYOMING.)

Statement of John P. Frank
Phoenix, Arizona
In Behalf of the Arizona Bar
Before the Senate Judiciary Subcommittee on Courts
In Re S-948
March 6, 1990

Thank you for the invitation to appear before this Subcommittee and for giving the Arizona State Bar the opportunity to be heard in opposition to the proposal to divide the Ninth Circuit Court of Appeals.

My name is John P. Frank and I have appeared before the Senate Judiciary Committee as a witness from time to time. I especially appeared before this Subcommittee on the current statute as to disqualification of judges and I have been involved over the years in most of the major discussions of matters of either procedure or jurisdiction for the federal courts. In the Carter Administration, I served on the Merit Selection Commission for the judges of the Ninth Circuit Court of Appeals. My practice has caused me to be well acquainted with the world of appeals; I am serving on the faculty of leading appellate lawyers in America gathered by the American Bar Association in New Orleans for a special training program on appeals next month. All of this gives me some knowledge and certainly a deep interest in the topic before us.

Some seventy percent of the litigation in the Ninth Circuit originates in California and Arizona. The portion which would be in the proposed new circuit would make this in terms of legal volume the smallest circuit in the country. In so saying, I exclude Hawaii, it being my clear understanding that Hawaii does not wish to be involved. This Circuit division proposal is expensive in dollars and wasteful of personnel.

1. I am opposed to the proliferation of jurisdictions, which make the practice of law more time-consuming for the lawyer and more expensive to the litigant. By staying together, so that lawyers practicing in the western United States need only be familiar with one body of circuit law, the Ninth Circuit has performed an enormous service for the bar and the public.

2. Much has been said about size. The Ninth Circuit is the largest geographic circuit in the United States of the federal courts, and it also has the largest population. That is because of the geography of the West. Any circuit with Alaska will be the largest geographic circuit in the country. Any circuit with California will be the largest in terms of population.

3. The last twenty years have seen an explosion in the work load of all courts, not just federal courts. All have grown in size. Compared with the structure of most state courts, the Ninth Circuit is small. There are approximately the same number of judges, trial and appellate, in the entire Ninth Circuit as there are of state judges, trial and appellate, in the state of Arizona. Arizona only created its

intermediate appellate court in the mid-60's. Since then, the number of judges on that court has nearly quadrupled. The total number of filings in the Ninth Circuit Court of Appeals is something over 6,000 compared with about 5,000 for the state court of appeals having jurisdiction over Brooklyn alone.

4. As I have said, the division suggested by this bill creates a circuit extending in size from Montana to the Pacific Rim with a caseload smaller than any other circuit. It would combine all the burdens that accompany such distances with none of the advantages of economy of scale and expertise of the present circuit.

5. The Ninth Circuit is viewed as a model and more studies have been done about its operation than any other federal court of which I am aware. My law firm helped sponsor a conference a few years ago which was part of an entire volume of the Arizona State University Law Review devoted to law reform with special emphasis on the Ninth Circuit. Articles by leading scholars in the field of judicial administration have been widely published.

6. We have to deal with crisis situations in some courts. The Ninth Circuit benefits from the ability to transfer judges from one district to another as the occasion demands. This flexibility has, for example, helped enable the district court in Arizona to continue to hear some civil cases despite the burden created by prosecutions of drug smugglers and illegal alien traffickers.

7. When I was a youngster studying constitutional law in 1937, the big constitutional issue before the country was court packing, or the alteration of judicial decisions by adding justices to the United States Supreme Court. The better wisdom of the country prevailed and the plan to change the law by changing the court system was abandoned. Here we have the same thing over again. With all deference to the distinguished and able senators from the Northwestern states who make this proposal, the heart of it is a dissatisfaction with decisions by the Circuit on matters relating to the environment. I respectfully submit that if we wish to have different rules of law, Congress should enact them; we should not seek to obtain them by changing the structure of the circuits.

8. Another particular complaint we hear from proponents of this legislation is the alleged domination of the Circuit by California. This, respectfully, is a mirage. California, with by far the bulk of the population of the Circuit, has approximately one-half of the judges, a smaller number than it would have by any ratio to volume of cases or population. The Northwestern states have more judges than they would be entitled proportionally because of the general tendency to try to have at least one judge from each state, a condition which we are regrettably lacking at the moment but which normally prevails.

But let us assume for the moment that there is some evil to this "domination" by California. I re-stress that I do not regard this as much of an evil; when Chief Justice Traynor was head of the California court system, we in Arizona and indeed most of the states in the country had very little trouble in regarding him as a national legal treasure. State after state followed the California Supreme Court in the Traynor days.

But let us honor the bogey man. If this bill passes, Nevada and Arizona are truly going to be dominated by California, whereas now in cases affecting our jurisdiction we have judges from all of the states of the Circuit. If the California judges are to be regarded as somehow a dangerous aggregation of spooks, a notion I regard as silly, then certainly this bill would turn the remaining states over to the bogey man.

9. But we of Arizona prefer to make a larger and more real point. The Ninth Circuit is operating efficiently. We like the availability of the exchange of judges within the Circuit. We find the administration of the Circuit admirable and the administrative recovery of the Circuit from the dreadful damage of the recent earthquake nothing short of heroic. We like having our cases come before a mix of judges which includes those of the Northwest. We like having a limited *en banc* procedure so that the occasional conflicts among the panels can be ironed out. We are very pleased with the Bankruptcy Appellate Panel which is working with efficiency.

This is not to say that we are overjoyed with every decision any more than any lawyer is. But if we get from the Circuit a rule of law we do not like, we would rather take it to Congress to repair rather than carve out some special little court of our own to give us decisions more to our liking.

In behalf of the bar of Arizona, we are grateful to have this opportunity to have our views considered. We are comforted by the fact that the bars of numerous of the other states, including some in the Northwest, have the same view as we: If you don't like the rules, there must be a better solution than shooting the umpire.

That our courts have problems we acknowledge; but neither the miniaturization or the multiplication of courts of appeal is going to solve anything. The plain fact is that the volume of legal conflicts in the United States has grown enormously. There are any number of law offices in the United States today with more lawyers than all of the courts of appeal put together. Wistful recall of the good old days when all the judges in the circuit could get a drink from the watercooler at the same time are gone forever. The Ninth Circuit has made a good adaptation to the problems of size.

Statement of

GILBERT F. GANUCHEAU
Clerk

United States Court of Appeals
Fifth Circuit
New Orleans, Louisiana

Senate Bill S.948
(101st Cong. 1st Sess.)

To Amend Title 28, United States Code
to Divide the Ninth Circuit

March, 1990

This statement is being submitted at the invitation of the Subcommittee on Courts and Administrative Practice. It will be limited to my involvement and experiences as the Circuit Clerk in the split of the former Fifth Circuit.

Structure of this Statement

This statement is structured in two main divisions:

Part One: This covers background information on the establishment of Units within the Fifth Circuit and the decisions and orders to recommend and implement the circuit split.

Part Two: This covers my experiences in establishing a Clerk's Office in Atlanta.

Part One

On May 5, 1980 the Judicial Council of the Fifth Circuit adopted a Resolution to accomplish the ultimate goal of dividing the Fifth Circuit into two completely autonomous circuits, one to be composed of the states of Louisiana, Mississippi and Texas with headquarters in New Orleans, Louisiana, to be known as the Fifth Circuit, and the other to be composed of the states of Alabama, Florida and Georgia with headquarters in Atlanta, Georgia to be known as the Eleventh Circuit. (See Attachment #1).

The specific details of the Resolution are as follows:

(1) That a petition be presented to the Congress to divide the Fifth Circuit into two autonomous judicial circuits. (See Attachment #2);

(2) That pursuant to the inherent and statutory authority vested in the Court in the 1978 Omnibus Judgeship Bill, that two administrative units be established effective July 1, 1980, along the same geographic lines as proposed in the petition to the Congress to split the circuit;

(3) That every case shall be filed, considered and decided in the unit in which it arose;

(4) That for the decision of cases filed in Units A and B that the Court organize itself into panels of judges residing within the states of the unit, reserving the right for all judges to sit throughout the entire circuit;

(5) But that there be only one body of law, one judicial council and one judicial conference for the circuit, and

(6) That the Chief Judge appoint a Transition Committee consisting of himself, and two judges from each unit "to prepare and present to the Judicial Council proposals for the orderly and effective implementation of this Resolution".

Subsequently on October 14, 1980, the Fifth Circuit Court of Appeals Reorganization Act of 1980, Public Law 96-452, was enacted, to become effective on and after October 1, 1981. In the opinion of the writer, the Council's decision to divide the circuit into two mostly autonomous units, some 17 months before the actual effective date of the split, was the key to the smooth transition, so that by October 1, 1981 each court unit was by then fully staffed and operational which meant only the paperwork of the official transferring of the cases from the Fifth Circuit to either the New Fifth or the Eleventh.

As required by § 11 of the Fifth Circuit Reorganization Act, the Chief Judge of the Fifth Circuit, as constituted on September 30, 1981, entered an order to implement the "allocation, assignment and disposition of cases to the former Fifth, New Fifth, and Eleventh Circuits". (See Attacments #3). The writer notes that these requirements appear to be the same in the pending legislation to divide the Ninth Circuit.

On October 1, 1981, the Chief Judge of the former Fifth Circuit also entered an order as required by the statute that listed the cases arising from the states of Alabama, Florida and Georgia that were not under submission to a panel at the close of business on September 30, 1981, ordering that "all of these appeals and proceedings, together with the original papers, records, and record entries be transferred to the newly created Eleventh Circuit". (See Attachment #4). The computer printout listing 1,944 cases as having been transferred is not attached to the enclosed copy of the order. A similar order was entered transferring unassigned cases to the New Fifth.

Part Two

Following the Court Meeting of May 5, 1980, the Transition Committee requested my input into the amount of time it would take to establish a separate Clerk's Office in Atlanta for Unit B which was to become effective shortly thereafter on July 1, 1980. Knowing the size of the Court's docket and anticipating that all personnel to staff the office would be new as well as all of the other logistical problems, I estimated that it would take approximately one year. The Committee responded that they would set a deadline of only three months from the effective date of July 1 or until October 1, 1980 for the creation of an operational Clerk's Office in Atlanta. Plans had to then be made for hiring and training personnel, designing the court facility to be made available for the Clerk's Office in Atlanta, the ordering of furniture and furnishings, all to coincide with the deadline date of October 1, 1980 for a Clerk's Office to be operational. The judges insistence of compliance with this brief time period was effective because if forced the Court unit heads and others to make immediate plans to establish their offices and insist on compliance by vendors, and others involved in the project, including the General Services Administration. The following is a description of the plans made for establishing the Atlanta Clerk's Office.

Organizational Structure - The organization of the Atlanta office was designed along the same lines as that in existence in New Orleans at the time. In short, what was created was a clone of the Fifth Circuit Clerk's Office in both physical appearance as well as organizational make-up, staffing and procedures.

Hiring and Training of Personnel - Our Clerk's Office was operating at the time with ten fewer deputies than authorized, so these positions were immediately available for filling in Atlanta. The Court requested the Administrative Office to authorize ten additional positions for a complement of 20 to be available for hiring and staffing of the Atlanta office.

How to accomplish the filling of all of these positions, the training of the personnel and the transfer of the cases in just three months was the item of major concern knowing that only two experienced people from New Orleans were willing to transfer and as with most Clerk's Office clerical positions, being filled by females with many having family commitments preventing travel, these positions could not be hired too far in advance. So, the following schedule was adopted so that on October 1, 1980 there would be in place 20 deputies in Atlanta:

(1) First the training of four case managers to handle and supervise the paperflow, which is the primary function of the Clerk's Office. Four case managers were hired from the Atlanta area and brought to New Orleans on July 1, 1980 for three months of on-line extensive training with their counterpart in New Orleans. This turned out to be just about adequate time for these people to have enough experience to handle the papers as well as assist in training new personnel in Atlanta.

(2) The vacant Chief Deputy Clerk position would be filled and stationed in Atlanta as the Office Manager with training to be done in New Orleans by the Clerk of Court.

(3) Thirty days in advance an Administrative Manager and Office Services Manager would be hired from the Atlanta

area and brought to New Orleans for 30 days of training with their counterparts.

(4) Ten (10) general clerical positions, all from the Atlanta area were hired two weeks in advance and brought to New Orleans for on-line training in initial case processing.

(5) Record room and mail personnel would be hired and trained in Atlanta.

Planning the Physical Facilities - The Court set the same deadline with the General Services Administration for the renovation of the former courthouse in Atlanta into facilities for the judges, Clerk's Office, Library, Circuit Executive and Staff Attorneys Offices. This required many meetings with the GSA in allocation of space for and design of a Clerk's Office facility. Since the available space in Atlanta was not of the same design as in New Orleans, more involved planning had to be made for the location of the various support offices of the Clerk's Office.

Supplies and Equipment - Since there was no furniture or any equipment in existence in Atlanta, the complete outfitting of the Clerk's Office in furniture, equipment and supplies had to be undertaken and accomplished within the same three month period. On September 28, 1980, the Friday before the effective date of October 1, the desks for the 20 deputies were being put in place and the staff outfitted that day with all of the equipment and supplies needed to operate, and the establishment of a Clerk's Office in Atlanta within three months was thus accomplished.

Transfer of Case Files and Training of New Personnel - The next most difficult and worrisome part of the creation of the Unit B was how to orderly transfer the cases that would belong to that district and train the staff knowing that the personnel to be assigned could not be fully trained in advance. The following was the plan adopted for the orderly transfer of cases:

(1) All cases under submission would continue to be monitored and processed in New Orleans, along with any cases not transferred;

(2) All statistical recording and reports would be generated in New Orleans until personnel could be hired and trained in Atlanta;

(3) The district court clerks of Unit B were instructed to lodge all new notices of appeal with the Atlanta Office after October 1, 1980;

(4) The deputies hired to handle case processing would first be trained in how to establish new appeals. As a new employee it was felt that that was about the most

they could absorb in just the two weeks set for training;

(5) Two or more New Orleans personnel would be stationed at all times in Atlanta on an alternating basis for training purposes;

(6) The second month in Atlanta, in November, 1980, all of the case files and records for appeals from Unit B states previously filed in New Orleans in August and September, prior to the opening of the office in Atlanta, would be transferred to Atlanta for further processing. These somewhat new appeals, also at an early docketing stage, then permitted the personnel to continue to be trained on other early docketing functions, such as monitoring outstanding cases awaiting the filing of the record, the filing of records and issuance of briefing notices, etc.;

(7) The third month, in December, another group of older Unit B cases were then transferred. The age of those cases then permitted training on other processing functions such as the filing of briefs, appendices, on the handling and processing of motions, etc. This same process of monthly transferring cases continued until February of 1981, by which time all of the pending cases from Alabama, Florida and Georgia were then in Atlanta being processed.

There was a lot of other planning to be done for other facets of a Clerk's office operations including that of courtroom deputies, calendar clerk, financial clerk, opinion clerk, mid-managers and other line support personnel.

By March of 1981 there was no longer any need for New Orleans personnel to be stationed in Atlanta and that office was then capable of functioning on its own except for occasional questions. So, rather than dumping a large number of cases on inexperienced personnel at one time, the secret to our success of an orderly and efficient manner of establishing a Clerk's Office and the transferring of a large number of cases was the backing-in of the cases over a six month period.

These are the highlights of my involvement in the plans made and things done to effectuate such an accomplishment. This could not have been done without the great efforts of many Clerk's office employees of the old Fifth Circuit.

In conclusion, the advantage that we in the Fifth Circuit had for the orderly and effective establishment of two separate judicial circuits was the advance decision to establish two autonomous court units prior to a decision by the Congress to divide the circuit. Also, the decision by the Congress to make the legislation effective 12 months after its passage was of equal importance, and should be included in any legislation ultimately adopted to divide the Ninth Circuit. It was a very rewarding experience to have been part of the historic occasion of dividing the Fifth and creating the Eleventh Circuit and having contributed to assisting in establishing the first Office of the Clerk of the Court for the Eleventh Circuit. I stand ready to share my experiences with others if need be.

Gilbert F. Ganucheau
Clerk

RESOLUTION ADOPTED BY THE JUDICIAL COUNCIL FOR THE FIFTH CIRCUIT
MAY 5, 1980

" BE IT RESOLVED by the Judicial Council of the United States Court of Appeals for the Fifth Circuit:

" That we respectfully petition the Congress of the United States to enact legislation dividing the presently existing Fifth Circuit into two completely autonomous judicial circuits, one to be composed of the States of Louisiana, Mississippi, and Texas, with headquarters in New Orleans, to be known as the Fifth Circuit; the other to be composed of the States of Alabama, Florida, and Georgia, with headquarters in Atlanta, to be known as the Eleventh Circuit; and, pending the consideration of such legislation by the Congress, and to eliminate numerous administrative difficulties, and pursuant to the inherent and statutory authority vested in this court, two administrative units are established within the Fifth Circuit effective July 1, 1980, Unit A to be composed of the States of Louisiana, Mississippi, and Texas, with headquarters in New Orleans, and Unit B to be composed of the States of Alabama, Florida, and Georgia, with headquarters in Atlanta; and every case shall be filed, considered and decided in the unit in which it arose and for the decision of cases filed in Unit B the court ordinarily shall organize itself into panels of judges residing in Alabama, Florida, and Georgia and for the decision of cases filed in Unit A the court ordinarily shall organize itself into panels of judges residing in Louisiana, Mississippi, and Texas (although the authority of judges to act as members of this court throughout this circuit shall in no wise be diminished or affected); and there shall be only one body of law, one judicial council and one judicial conference for the circuit.

" BE IT FURTHER RESOLVED that the Chief Judge is hereby directed to appoint a transition committee consisting of himself and two judges from each unit to prepare and present to the Judicial Council proposals for the orderly and effective implementation of this resolution."

ATTACHMENT #1

PETITION TO THE CONGRESS

The undersigned judges in regular active service of the United States Court of Appeals for the Fifth Circuit respectfully petition the Congress of the United States to enact legislation dividing the presently existing Fifth Circuit into two completely autonomous circuits, one to be composed of the states of Louisiana, Mississippi and Texas with headquarters in New Orleans, Louisiana, to be known as the Fifth Circuit, and the other to be composed of the states of Alabama, Florida and Georgia with headquarters in Atlanta, Georgia, to be known as the Eleventh Circuit;

By separate documents we will, at an appropriate time provide to the Congress a summary of the problems that occasion this petition and of the justification for the proposed legislation.

This 5th day of May, 1980.

Respectfully submitted,

Jas. P. Coleman
Chief Judge

Henry A. Politz

Frank M. Johnson Jr.

Robert A. Ainsworth Jr.

Albert J. Henderson

Charles Clark

Gerald Bard Tjoflat

John Godbold

Peter T. Fay

Paul H. Roney

Robert S. Vance

Thomas Gibbs Gee

Phyllis Kravitch

Reynaldo Garza

Sam D. Johnson

James C. Hill

Joseph W. Hatchett

Alvin B. Rubin

Thomas M. Reavley

R. Lanier Anderson

Thomas A. Clark

Albert Tate

ATTACHMENT #2

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

ORDER

Pursuant to the requirements of the Fifth Circuit Court of Appeals Reorganization Act of 1980, Public Law 96-452, dated October 14, 1980, the following order is entered to implement the allocation, assignment and disposition of cases to the former Fifth, new Fifth, and Eleventh circuits.

(1) Notices of appeal filed with the district courts of the United States within the states of Louisiana, Mississippi and Texas on or after October 1, 1981, and any original agency review proceeding under Federal Rule of Appellate Procedure 15 arising within this same jurisdiction, shall be filed in the new Fifth Circuit and such appeals and review proceedings shall be submitted to and decided by the new Fifth Circuit.

(2) Notices of appeal filed with the district courts of the United States within the states of Alabama, Florida and Georgia on or after October 1, 1981, and any original agency review proceeding under Federal Rule of Appellate Procedure 15 arising within this same jurisdiction, shall be filed in the Eleventh Circuit and such appeals and review proceedings shall be submitted to and decided by the Eleventh Circuit.

(3) If an appeal or proceeding has been submitted for decision prior to October 1, 1981, further proceedings in respect of the matter (including petitions for rehearing and rehearing en banc) shall be had

in the same manner and with the same effect as if the Act had not been enacted.

- An orally argued case is considered to have been submitted on the date of argument. Thus cases argued on or before September 30, 1981, shall be considered and decided by the Fifth Circuit as constituted on September 30, 1981, (the "former Fifth") in the manner and under the rules and procedures of that court in effect September 30, 1981.
- All summary or nonargument cases fully decided (that is, the last panel judge having concurred) on or before September 30, 1981, shall be former Fifth Circuit cases and handled under the practice and rules of the former Fifth Circuit in effect September 30, 1981.

(4) All court orders and opinions in former Fifth Circuit cases rendered on or after October 1, 1981, shall be footnoted as follows:

> "Former Fifth Circuit case, Section 9(1) of Public Law 96-452, October 14, 1980.

(5) A National Labor Relations Board contempt proceeding initiated on or after October 1, 1981, shall be docketed as a new proceeding in the circuit, Eleventh or new Fifth, that would have jurisdiction of the matter if it were a new proceeding.

(6) Appeals remanded by the Supreme Court of the United States from former Fifth Circuit decisions are to be reopened and reconsidered under the rules, practices and procedures of the former Fifth Circuit for handling such matters, in effect on September 30, 1981.

(7) All other appeals or proceedings not under submission for decision on or before September 30, 1981, and those not within paragraphs (5) and (6) above, are each hereby ordered transferred to the court, Eleventh or new Fifth, to which it would have gone had the Act been in full force and effect at the time the appeal was taken or other proceeding commenced. The original papers, printed records, and record entries duly certified by the clerk of the former Fifth Circuit, shall be transferred to the transferee court, and further proceedings in respect of the case shall be had in the same manner and with the same effect as if the appeal or other proceeding had been there filed.

This order is entered by the United States Court of Appeals for the Fifth Circuit, as constituted on September 30, 1981, and as authorized under § 11 of the Act to take administrative action to carry out the Act.

DONE this the 16th day of ~~October~~ November 1981, effective as of October 1, 1981.

John C. Godbold, Chief Judge
United States Court of Appeals
for the Fifth Circuit, as constituted September 30, 1981.

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

ORDER

It appearing to the court that the cases listed on the attached pages arising from the states of Alabama, Florida, and Georgia were not under submission to a panel of the court at the close of business on September 30, 1981, IT IS ORDERED, pursuant to Sec. 9(2) of Public Law 96-452, that these appeals and proceeding, together with the original papers, printed records and record entries, are hereby ordered transferred to the United States Court of Appeals for the newly created Eleventh Circuit.

Done this October 1, 1981.

John Godbold

John C. Godbold
Chief Judge of the
Former Fifth Circuit

Prepared Statement of
Arthur D. Hellman[*]

on S. 948

Before the
Subcommittee on Courts and Administrative Practice
of the Senate Judiciary Committee
March 6, 1990

I appreciate this opportunity to express my views on S. 948, the "Ninth Circuit Court of Appeals Reorganization Act." In my judgment, dividing the Ninth Circuit is neither necessary nor desirable at this time. Rather, the circuit should be allowed to continue an experiment in judicial administration that will ultimately redound to the benefit of the entire federal judicial system.

Three experiences have shaped my views on S. 948. From 1973 through 1975 I served as deputy executive director of the Commission on Revision of the Federal Court Appellate System (Hruska Commission). In that capacity I helped to write the report that recommended that the Ninth Circuit be divided into two new circuits. In 1978-79 I took a leave of absence from teaching to serve as director of the central legal staff of the Ninth Circuit Court of Appeals. Part of my responsibility was to devise and implement procedures that would assist the court to do its work more effectively, and in particular to meet the new needs created by the expansion of the court from thirteen to twenty-three active judges.

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[*] Professor of Law, University of Pittsburgh.

Finally, for the last three years I have been directing a study by fourteen legal scholars and political scientists of the Ninth Circuit's structural and procedural innovations during the period 1976-1988.[1] The fruits of that study are scheduled for publication by Cornell University Press later this year as Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts.

In this statement, I shall explain the basis for my conclusion that S. 948 should not be enacted at this time. In summary:

- -- The Hruska Commission's recommendation of 1973 has been outdistanced by events, and should be given little weight in deciding whether to divide the Ninth Circuit today.
- -- The arguments made in support of dividing the circuit do not withstand examination.
- -- There are affirmative reasons for not dividing the Ninth Circuit in the immediate future.

I. The Hruska Commission's Recommendation

In 1973, the Hruska Commission, in a report I helped to write, recommended that the Ninth Circuit be divided into two new circuits. The proposed realignment was similar to the one now contemplated by S. 948, except that two of the four judicial districts of California would have been included in the northern circuit and two in the southern.[2] Congress chose not to follow the Commission's recommendation.

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[1] Of course, the views expressed in this statement are my own and are not necessarily shared by the other authors.

It is a moot point whether the proposed realignment would have achieved the desired ends if the legislation had been enacted in the mid-1970s. Circumstances have changed considerably over the past seventeen years, and today the Hruska Commission's recommendation should be given little weight. Three considerations underlie this conclusion.

First, the Hruska Commission explicitly predicated its recommendation on the premise that "[s]erious problems of administration and of internal operation inevitably result with" an appellate court of fifteen or more active judges. The Ninth Circuit's experience over the past decade demonstrates that innovative approaches to adjudication and administration can go far towards mitigating the problems of operating a large court -- even one much larger than fifteen judges. For example:

-- Computerized issue tracking systems, far more sophisticated than anything available in 1973, assist the court in assuring that panels are aware of what others are doing and conform to existing precedents.

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[2] In addition, the designation "Ninth" would have been retained by the northern rather than the southern circuit.

- The "limited en banc" authoritatively establishes the law of the circuit without the need for participation by all active judges in every case.
- An executive committee of the court of appeals allows the court to concentrate the responsibilities of administration and governance in a small rotating group of judges rather than burdening all.
- The restructuring of the circuit council frees most of the court of appeals judges from having to spend time on matters relating to the governance of the trial courts within the circuit.

Second, any "relief" through circuit division would be even more temporary in its effect than the Hruska Commission envisioned.

In 1973, the Commission could reasonably hope that an immediate division of the Ninth Circuit would avoid the need for an appellate court of more than fifteen judges for at least some years to come. That possibility is now gone. For example, if the appellate judgeships of the present Ninth Circuit were allocated on the basis of caseload between the two new circuits proposed in S. 948, the new Ninth would be entitled to nineteen.[3] And if Congress creates new judgeships in accordance with current Judicial Conference recommendations, five of the twelve regional circuits would have fifteen or more appellate judgships.

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[3] This calculation is based on 1988 caseload figures, the latest available to me.

Third, the mandate of the Hruska Commission was to examine the structure and internal procedures of the federal court appellate system. The Commission had no occasion to consider, and did not consider, the operation of the circuit as distinguished from the court of appeals. But one of the important points to emerge from the Ninth Circuit innovations study is the role of the circuit as an institution for promoting regional decentralization in the federal judicial system.[4] Half a century ago, Congress created the circuit councils and made them "the cornerstone of the federal judiciary's administrative institution."[5] The architects of that system viewed the circuit as "an intermediate structure that makes it possible to carry out the tasks of adjudication and governance from a perspective that transcends the borders of a single district or state, yet without concentrating power in a centralized set of institutions."[6] Over the last few decades, Congress has moved further in that direction by adding to the responsibilities of the circuit councils.

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[4] The role of the circuit and the operation of circuit-wide institutions are examined in four of the chapters of Restructuring Justice. In chapter 5, Professor Michael A. Berch analyzes the Bankruptcy Appellate Panel. Chapter 10, by Professor Doris Marie Provine, examines circuit governance generally, and Chapter 11, by Professor Stephen L. Wasby, focuses on the role of the bar. In Chapter 13, Professor Judith Resnik considers the role of the circuit in the federal judicial system.

[5] Peter Graham Fish, The Politics of Federal Judicial Administration 165 (1973).

[6] Arthur D. Hellman, Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts, chapter 1 (forthcoming 1990; manuscript subject to revision).

The large circuit may well have some advantages in carrying out these tasks. On the administrative side, economies of scale can be realized. Staff specialization, especially in matters involving technology, is more feasible. And in matters of governance, the larger and more diversified the polity, the easier it is to bring a variety of viewpoints to bear on the work of the courts within the districts. During the last decade and a half, the Ninth Circuit has pioneered in the development of circuit-wide institutions that strengthen the system of regional decentralization established by Congress in 1939.

From this perspective, there is a certain poignancy in the fact that S. 948 is called the "Ninth Circuit Court of Appeals Reorganization Act." Of course, the legislation would also reorganize the circuit council, the circuit conference, the Bankruptcy Appellate Panel, and other institutions that in some ways have made a distinct virtue of size.

* * *

In suggesting that Congress and this Committee not give great weight to the Hruska Commission's recommendation for dividing the Ninth Circuit, I do not disavow the approach taken by the Commission in its 1973 report. I continue to believe that a single state should not constitute a single federal circuit. I agree with the Commission that allocating the judicial districts of California between two circuits would not raise any insoluble or unmanageable problems. And if realignment should become unavoidable sometime in the future, I think that the division recommended by the Hruska Commission is the preferable one. But for now, the remedy of division is unnecessary.

II. Analysis of Arguments for Dividing the Circuit

Review of the statements and articles supporting S. 948 points to three principal arguments: a lack of coherence in the law of the circuit; a lack of "geographical balance"; and delay and backlog in the court of appeals.[7] These will be addressed in turn.

A. "Lack of coherence" in the law of the circuit

First, it is argued that a "lack of coherence and unity" in the law of the circuit has resulted from "a growing incidence of inconsistency or conflict among the decisions of the three-judge panels."

It is certainly plausible to suppose that the large number of judges, and the thousands of different three-judge combinations, would lead to conflicts among panel decisions. But intuitions are not always correct.[8] Over the last several years, I have undertaken three empirical studies to shed light on the extent of intracircuit conflict in the Ninth Circuit. These studies lend little support to the proposition that a "lack of coherence and unity in the Ninth Circuit's decisions" has resulted in the court's inability "to speak with one voice."

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[7] The formulations in this section are drawn from statements in the Congressional Record and from Hatfield & Gorton, "Time for a New Federal Circuit in the West: Why the Ninth Circuit Should Be Divided," Daily Journal Report, Sept. 29, 1989.

[8] See Conference on Empirical Research in Judicial Administration, 21 Ariz. St. L.J. 33, 34 (1989).

The first study developed a theory of intracircuit conflict and applied it to a one-in-five sample of Ninth Circuit panel decisions handed down in 1983. The study concluded that intracircuit conflict is not as much of a problem as it is sometimes thought to be, and that the perception of conflict is skewed by the admitted disarray in a few high-visibility areas of the law characterized by a large volume of cases and fact-specific legal rules. The results of the study are set forth in detail in an article published in the University of Chicago Law Review last year.[9]

The second study took a different approach. In late 1988, I circulated a questionnaire to members of the Ninth Circuit Judicial Conference -- lawyers as well as judicial officers -- and asked them to identify specific examples of intracircuit conflicts. More than 50 percent responded -- a very high proportion for a mail survey. An analyis of the responses is attached as Appendix A. Overall, the analysis tends to confirm the findings of the Chicago article. But it also suggests that some relatively minor changes in the court's practices could reduce both actual and perceived inconsistencies in the work of the court's three-judge panels. The judges have been receptive to these suggestions, and I understand that the court of appeals has already taken some steps in that direction.

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[9] Hellman, "Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court," 56 U. Chi. L. Rev. 541 (1989).

I am now working on a follow-up study to the Chicago article. For this study I am analyzing a one-in-five sample of Ninth Circuit panel decisions handed down in 1986. While the work is still in progress, I have found no evidence thus far to suggest that overall patterns will be significantly different from those revealed by the 1983 sample.

B. Lack of "geographical balance"

A second argument is that the Ninth Circuit Court of Appeals lacks "geographical balance." In particular, it is said that judges who lack a full understanding of the regional milieu out of which legal issues arise are hindered when making decisions that involve those issues. This lack of regional balance is seen as "particularly troubling when, as now, the Northwest is developing its own legal issues in such areas as energy, commercial and environmental law."[10]

This is a puzzling argument. To the extent that the "regional milieu" is relevant to the legal issues, we can expect that it will be developed in the record. Development of a record -- the facts upon which decision is to be based

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[10] This statement of the argument is drawn from Hatfield and Gorton, supra note 5.

-- is the responsibility of the lawyers and the trial court. Trial judges, of course, are appointed from the bar of the state in which the court sits, and will be fully familiar with the regional milieu.

Appellate courts, in contrast, are responsible for articulating and expounding rules of law. And the reference to energy and environmental law makes clear that the argument refers to matters controlled by federal law -- in particular, issues of federal statutory interpretation. But surely it would be agreed that the interpretation of federal statutes should be, to the greatest extent possible, uniform throughout the country.

In short, to the extent that cases turn on the regional milieu, the regional perspective will be reflected in the work of the district judge; to the extent that cases turn on the law, the goal is to minimize the variations from one jurisdiction to another. "Greater regional representation" on the court of appeals is thus a poor argument for dividing a circuit.

C. Delay and backlog in the court of appeals

Finally, supporters of S. 948 point to "delay and backlog" in the court of appeals.

It is true that the median time for processing a case in the Ninth Circuit Court of Appeals is substantially longer than the national average. What is not clear is whether this has anything to do with the size of the court. If that were the case, we would expect to find at least a rough correlation between the size of the circuit and the time required to process an appeal. But the correlation is not there; for example, the circuit with the worst record is the Tenth, which has less than half the number of judges that the Ninth does.

It is also worth noting that most of the delay in the Ninth Circuit is attributable to the period from filing the notice of appeal to the time of hearing or submission. If one looks only at the time the cases are being considered by the judges (hearing to final disposition), only three circuits have better records than the Ninth.

In calling attention to these data, I do not deprecate the importance of dispatch in the appellate process, nor do I disagree with the proposition that the Ninth Circuit should take steps to improve its record. The point is only that there is no evidence to suggest that the Ninth Circuit's problems result from its size.

III. A Larger Perspective

What I have said thus far suggests that division of the Ninth Circuit is not necessary at this time. But if there is a strong desire for division by some or all of the bench and bar within the circuit -- especially those in the northwest who would like to escape the "California influence" -- would there be any harm in acceding to their wishes? I think there would be. To divide the Ninth Circuit now would be to lose the full benefit of an experiment in judicial administration that has not yet run its course. Continuation of that experiment will provide valuable information to other circuits as the federal judicial system expands to meet the needs of the future.

As of 1990, all but three of the twelve regional courts of appeals already have caseloads that exceed the caseload of the Ninth Circuit in 1973, when the Hruska Commission proposed to divide it.[11] If the 1988 recommendations of the Judicial Conference of the United States are approved, six of the courts of appeals will have more judgeships than the Ninth did in 1973, and five others will be at or one short of that number. In short, large circuits will be an inescapable part of the judicial landscape of the next century. And sooner or later, virtually all of the circuits will be facing the problems that the Ninth has already had to confront.

Over the last decade, the Ninth Circuit has undertaken a remarkable range of innovations in an effort to determine whether a large circuit can be made to work effectively. Thus far the results have been encouraging, but they are not definitive. For example, as noted above, the court of appeals is still fine-tuning the information-processing systems used to maintain uniformity in the law of the circuit. The Bankruptcy Appellate Panel has been operating for only a few years, and under a rule that permits litigants to "opt out".

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[11] The Ninth Circuit's filings in 1973 were 2,316. In statistical year 1989, only the District of Columbia, First, and Tenth Circuits had fewer than 2,500 filings.

Less than a month from today, the Federal Courts Study Committee will be issuing its final report. Whatever specific recommendations emerge from that distinguished body, one theme surely will be that the system must be considered as a whole, and from a long-term perspective. The range of possible reforms is wide, but each has costs as well as advantages. In shaping the future of the federal judicial system, Congress will want the best possible basis of information. By allowing the Ninth Circuit to continue its efforts to show that the large circuit can work effectively, Congress will serve that purpose well.

Appendix A

Inconsistency in the Ninth Circuit Court of Appeals: Perceptions, Realities, and Prescriptions[*]

Arthur D. Hellman[**]

When seven Senators from northwestern states introduced a bill to divide the Ninth Circuit, they placed heavy emphasis on a 1987 survey reporting that a majority of judges and lawyers disagreed with the statement, "There is consistency between panels [of the Ninth Circuit Court of Appeals] considering the same issue."[1] They also noted that a substantial proportion (though not a majority) of the respondents to the same survey disagreed with the statement, "Ninth Circuit opinions generally adhere to law announced in earlier opinions."

Certainly these findings are disturbing, but viewed in isolation they raise more questions than they answer. What is meant by "inconsistency" between panel decisions? What is the factual basis for the perception that the law of the circuit is in disarray? Has the court of appeals taken steps to modify the practices that gave rise to actual or perceived conflicts? Until these questions are answered, it would be shortsighted for Congress to take action in reliance on the

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[**] Professor of Law, University of Pittsburgh School of Law.

[1] The survey was conducted by the Circuit Executive's Office in the Ninth Circuit.

1987 survey, or even to assume that inconsistency is a serious problem in the Ninth circuit.

In late 1988 I conducted another survey, this one focusing specifically on consistency in the law of the Ninth Circuit. A questionnaire was sent to all members of the Ninth Circuit Judicial Conference, lawyers as well as judicial officers.[2] More than 50 percent responded -- a very high proportion for a mail survey. Among other questions, I asked the respondents to identify actual examples of intracircuit conflict. The results have now been tabulated and analyzed, and I believe that they shed significant light on the extent and nature of conflict in the Ninth Circuit Court of Appeals.

Overall, the analysis indicates that intracircuit conflict is not the problem that some judges and lawyers believe it to be. The contrary perception may be unduly influenced by the admitted disarray in a few high-visibility areas of law characterized by a large volume of cases and fact-specific legal rules. At the same time, the study suggests that relatively minor changes in the court's practices -- some already under way -- could reduce both actual and perceived inconsistencies in the work of the court's three-judge panels.

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[2] I am grateful to Chief Judge Alfred T. Goodwin for his support and cooperation in getting the survey under way; to Assistant Circuit Executive Mark Mendenhall for able and enthusiastic administrative support; and to all of the judges and lawyers whose willingness to respond to the survey made the study possible.

The survey respondents cited a total of about sixty alleged conflicts. The figure is not exact because some of the responses were incomplete or ambiguous. However, all doubtful citations were included in the analysis so as not to underestimate the extent of conflict.

Omitted Precedents

In about half of the examples, the later case did not even cite the earlier one. Everyone would agree that, at a minimum, a court should cite all relevant contrary precedents. What went wrong?

In a third of the cases in this group, nothing went wrong, either because the earlier case did not reach a different result or, more commonly, because it did not involve the same issue as the later one. For example, one respondent asserted that two Ninth Circuit admiralty cases disagreed over whether in rem jurisdiction may continue after the release of the vessel. However, in the later case the panel ruled against the bidder on other grounds and explicitly noted that "we do not reach [the] jurisdictional problem" arising out of the release of the vessel.[3] Thus there was no conflict.

The next group of non-citation cases -- 11 in number -- was more troublesome. The reason the "later" case did not cite the "earlier" one is that both were under submission at the same time. But the court of appeals has established some elaborate mechanisms to assure that when two pending cases share a common issue -- as these did -- each panel will know about the other's case. What happened here?

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[3] Puget Sound Production Credit Ass'n v. Oil Screw Johnny A., 819 F.2d 242, 244 n. 5 (9th Cir. 1987); compare Alyeska Pipeline Service Co v. Vessel Bay Ridge, 703 F.2d 381 (9th Cir. 1983).

In a majority of the examples, the staff attorneys had assigned the two cases the same issue code. Somewhere along the line, there was a glitch, and the information did not get into the panel's hands when it should have.

The conclusion I draw from this is that the inventory system itself is sound, but the mechanism at the later stages needs some fine-tuning. With relatively little effort, it should be possible to avoid these omissions in the future. Happily, it appears that movement in that direction is already under way. The court is hiring two full-time attorneys who will work only on the inventory process -- coding issues and informing panels of the pendency of appeals presenting similar or related issues.

This leaves about half a dozen cases in which the panel failed to cite a relevant precedent that was on the books at the time of oral argument. For each of these, I tried a simple key word or Shepards search in Westlaw -- and in each instance I found the missing precedent with little difficulty.

Does this mean that the judges and their law clerks weren't doing their job properly? Not necessarily. In conducting the experiment, I had the advantage of being able to work from a finished opinion in the later case. Research by the authoring judge would logically take place in the inital stage of work on an opinion. The study thus reinforces the idea, found in some of the survey responses, that a second round of Lexis or Westlaw searching in the final stages of drafting might uncover precedents that had not turned up earlier in the process.

When these findings were reported to the Court of Appeals, some judges asked whether I had attempted to determine whether the omitted precedents had been cited by the attorneys. I had not, but I do not think this is dispositive. While it is certainly part of the attorneys' job to cite all relevant precedents, their occasional derelictions do not excuse the judges. Whatever the rule might be in a court that always sits en banc, judges on a court that sits in panels and follows a rule of intracircuit stare decisis have a responsibility to assure that they do not inadvertantly create a conflict by failing to discover and distinguish relevant precedents that reach different results.

In critiquing these last two groups of examples, I do not imply that the pairs of decisions cited by the survey respondents were actually inconsistent. In most instances, they were not. But a panel's failure to cite a relevant contrary precedent adds to the burdens of lawyers and lower court judges irrespective of whether the rulings can ultimately be reconciled. And when no explanation is provided for the different results, it is understandable that readers of the court's opinions jump to the conclusion that reconciliation is impossible.

Doubtful Distinctions

Different issues are raised by the survey examples -- about half of the total -- in which the later panel did cite or discuss the earlier precedent. A few of the cases clearly did not involve conflicts; as with the non-citation cases, the earlier decision either was consistent or dealt with a different issue.

At the other extreme, the survey respondents identified a handful of cases in which it seemed to me that there were grounds for thinking that a panel had not dealt fairly with a contrary precedent. In one of these instances, the active judges apparently agreed: they vacated the panel opinion and granted en banc review. Ultimately the eleven-judge en banc panel overruled the earlier case, thus acknowledging the conflict.[4] The other cases in this group raised more subtle problems. For example, two respondents perceived a conflict in Ninth Circuit decisions on claims of predatory pricing as a violation of section 2 of the Sherman Act. There is little doubt that the court's decisions have created confusion in the past, but respected commentators disagree as to whether more recent rulings have clarified the law.[5]

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[4] Compare United States v. Aguon, 813 F.2d 1413 (9th Cir. 1987) (panel decision), with United States v. Aguon, 851 F.2d 1158 (9th Cir. 1988) (en banc).

The remaining cases can be usefully classified in two groups. In some, the panel contributed to the appearance of conflict -- and I emphasize appearance -- by failing to adequately explain the differences between the case before it and an existing precedent. It is understandable that the judges would try to keep their opinions as short as possible, but the survey suggests that a few sentences of explanation to distinguish a contrary precedent -- even one that the judges think is obviously different -- would reduce the perception that there is inconsistency in the court's decisions.

The point is illustrated by a pair of cases cited independently by two survey respondents as an example of conflict. Both cases raised the question whether junior encumbrances should be considered in determining whether a particular creditor can gain relief from the automatic stay in bankruptcy. The first case held that the junior liens should not be considered; the later case held that they should be. But the two cases involved different subsections of the bankruptcy code -- subsections that provided alternate bases on which to grant relief. The later case noted the distinction, but only in a brief parenthetical reference.[6]

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[5] Compare Gifford, The Role of the Ninth Circuit in the Development of the Law of Attempt to Monopolize, 61 Notre Dame L. Rev. 1021, 1048-49 (1986) (suggesting that a 1981 decision helped to reconcile prior confusing case law), with P. Areeda & H. Hovenkamp, Antitrust Law § 711.1d (1988 Supp) (calling the same decision unworkable).

Citing a precedent with a "Cf" signal, and following it by a concise (even elegant) parenthetical, may satisfy the Bluebook, but it is likely to escape the eye of a lawyer writing a brief or a trial judge who has to rule on a motion. Here the brevity of the discussion created an unnecessary and inaccurate perception of intracircuit conflict.

In the remaining cases, what I saw at work was the dialectical process of the common law. Sometimes the contrary precedent was at best supporting for the losing side; sometimes it was arguably compelling. But in each instance the panel distinguished it in a way that was well within legitimate bounds and thus did not create a conflict.

In this light, the responses to two of the more general survey questions take on particular interest. First, I asked whether the respondents agreed or disagreed with the statement, "A later panel can reject dictum in an earlier NInth Circuit opinion without creating a conflict." Two-thirds of the lawyers agreed with the statement. So did two-thirds of the circuit judges and three-fourths of the trial judges.

Next, I asked whether the respondents agreed with the statement, "It is legitimate for a later panel to reformulate the rationale of an earlier decision, as long as it provides a principled and understandable explanation for treating the cases differently." Substantial majorities of all groups agreed with that proposition as well; in fact, the percentages were almost identical.

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[6] Stewart v. Gurley, 745 F.2d 1194, 1195 (9th Cir. 1984) (distinguishing Eli v. Mellor, 734 F.2d 1396 (9th Cir. 1984)).

These findings, especially the latter, came as something of a surprise. But it is reassuring to learn that within this influential group there is a widely shared commitment to a vision of decisional law that allows for flexibility and open-endedness and growth. What it requires is explanation.

I do not want to overstate the point. Explanation, however cogent, will not satisfy everyone. In fact, a number of the alleged conflicts cited by the survey respondents could not have been so characterized if the respondent really accepted what I would call the traditional view of precedent.

One other finding of the survey is relevant here. In a separate question, I asked whether there were any areas of the law in which inconsistency was a particular problem. The answer that appeared most frequently was immigration; third in the ranking was Social Security. But not a single respondent cited an immigration or Social Security case in response to the question about specific conflicts. On the other hand, search and seizure law, the second most often listed area, generated seven of the alleged conflicts, more than 10 percent of the total.

These data provide important clues to understanding the findings of the 1987 survey. The proliferation of fact-specific decisions in areas such as immigration, Social Security, and the fourth amendment has created a perception of conflict that is out of proportion to reality. Other evidence indicates that in those areas the perception of disarray is justified.[7] But those areas are not representative of the court's work as a whole.

Conclusion

Analysis of the survey responses, together with data from my other studies, suggests three conclusions. First, to diminish the perception of inconsistency, the Court of Appeals can and should make some minor changes in the way it conducts its work. The court should fine-tune its mechanisms for communication between the central staff and the judges. Authoring judges or their law clerks should routinely conduct an additional Lexis or Westlaw search after the opinions have been drafted. And panels should take a few sentences to distinguish contrary decisions even when the differences seem obvious. By taking these small steps, the court could substantially reduce the number of cases that appear to be in conflict.

Second, apart from cases in which the appearance of conflict is produced by failure to cite a contrary precedent or to explain why the result is different, the perception of inconsistency in the law of the Ninth Circuit rests in large part on the admitted disarray in some highly visible areas of the law characterized by numerous precedents and fact-specific legal rules. There is probably nothing that can be done about this except to recognize that issues of this kind are the exception rather than the rule.

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[7] For extended discussion, see Hellman, Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court, 56 U. Chi. L. Rev. -- (forthcoming spring 1989).

Finally, some of the "conflicts" cited by the survey respondents may implicate legitimate disagreements over the degree of freedom that panels ought to have in treating existing precedents. Just as with intercircuit conflicts, variations in approach that would be seen by some as nothing more than the common law "work[ing] itself pure from case to case"[8] will be regarded by others as creating an undesirable level of uncertainty and unpredictability. This jurisprudential point should not be overemphasized, however. Cases of this kind represent no more than a tiny proportion of the court's work; the overwhelming majority of decisions pose no threat to consistency even from a perspective unsympathetic to the open-endedness of the common-law tradition.

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[8] Hughes, Are Justices Just? N.Y. Rev. Books, Nov. 19, 1981, at 41, 42 (quoting Lord Mansfield).

RE: S. 948

NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT

STATEMENT OF
ROMAN L. HRUSKA
FORMER UNITED STATES SENATOR
FROM NEBRASKA (1954-1976)

FOR MARCH 6, 1990 HEARING

SUBCOMMITTEE ON COURTS
AND
ADMINISTRATIVE PRACTICE

THE HONORABLE HOWELL HEFLIN, CHAIRMAN

STATEMENT OF ROMAN L. HRUSKA ON S. 948

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

It is a special pleasure for me to appear once again in a session of hearings of a Committee on which I had the good fortune to serve as a Member for two decades. I express to each of you my greetings and my warm regards. Also my appreciation for the opportunity to share with you some of my thoughts on the Bill 948, which provides for the division of the present boundaries of the Ninth Circuit Court, and for the creation of a new Circuit.

The subject of division of Circuit Court geographical jurisdiction is not new in the history of this Committee; nor to this witness. Twice in my experience there was extended and detailed consideration given to it, to wit: (1) The Biggs Committee of 1964; and (2) The Commission on Revision of the Federal Court Appellate System which was created in 1972.

The Biggs Committee, officially designated as Committee on the Geographical Organization of Courts, was appointed by Chief Justice Earl Warren, pursuant to a Judicial Conference Resolution. It made a Report which included a recommendation that a division of the Fifth Circuit boundaries be made, and a new Circuit created. Hearings in the House and Senate were extended, detailed and prolonged; but no legislation resulted.

The Commission on Revision of the Federal Court Appellate System, was created by an Act signed into law in October, 1972. It had 16 members: four from the House; four from the Senate; four appointed by the President; and four appointed by the Chief Justice. It was my great honor to be designated Chair. One of its several mandates was to make a report to the Congress within 180 days of its existence on the realignment of any circuit court boundaries. It complied with that mandate.

Contrary to what some have suggested, the Commission did not propose a rule of thumb calling for a new circuit whenever the number of judgeships in an existing circuit exceeded nine, or some other pre-determined number. It rejected any such mechanical approach. Likewise, it considered and rejected the possibility of drawing a new national map, realigning all of the circuit, a procedure that some had urged and that had a certain theoretical appeal.

Instead, it focused on the two circuits that gave evidence of significant problems, the Fifth and the Ninth. Recommendations were made for dividing each of them. This would have created the Eleventh and the Twelfth Circuits.

Lawyers are conservative, and for this purpose most judges are lawyers, at least when it comes to institutions that have commanded loyalty and devotion, as the judicial circuits have. Thus, the proposals of the Commission filed in December of 1973 met with substantial resistance. However, and for their own reasons the judges of the old Fifth Circuit came to the Congress and asked for the creation of a new circuit.

The Congress granted the request and I am pleased to report, as has already been reported to this body in testimony offered on other occasions, that the judges of the new Fifth and the new Eleventh Circuits are delighted with the resultant benefits to them and to the cause of justice.

The Ninth Circuit chose to follow a different course. It created administrative divisions, and also devised a limited en banc hearing by virtue of which 11 judges would sit to determine the law of the circuit, five of whom could establish that law for the remaining 23 active judges, to use current figures. With great energy and dedication they set about trying to make that experiment work.

They did so under the leadership of Chief Judge James R. Browning, and there followed what are affectionately and respectfully called the Browning years. Jim Browning served as Chief Judge of the Ninth Circuit from 1976 to 1988. Professor Arthur Hellman, in the preface to a forthcoming volume on the Ninth, put it well when he said of Judge

Browning: "there can be no doubt that his own zeal for experimentation and, later, his commitment to avoiding a division of the circuit gave decisive momentum to the currents of change."[1] I am pleased to join in praising Judge Browning; there is much for which he deserves praise. However, Judge Browning himself would be the first to recognize that current problems must be addressed on the merits in the light of developments. To urge that at this juncture creation of a twelfth circuit will best serve the interests of the judiciary and the public, as I do, does not denigrate from Judge Browning or his achievements. We turn to analyze the present situation.

The United States Court of Appeals for the Ninth Circuit has had significant problems over a period of years, particularly with respect to the median time from filing a notice of appeal to final disposition in cases adjudicated on the merits. Since 1984 the elapsed time has increased every year, and in 1988 the figure was 14.5 months, ranking the Ninth eleventh among the 12 regional circuits. Preliminary data for 1989, the last available to me, indicate that the elapsed time has grown once again.

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[1] Justice Restructured: The Innovations of the Ninth Circuit and the Future of the Federal Courts (Hellman ed., Cornell University Press, forthcoming 1990), quoted with permission, but manuscript subject to revision.

This statement also draws on a chapter in the same volume by Professor A. Leo Levin entitled Lessons for Smaller Circuits; Caution for Large Ones, in which circuit realignment is discussed and analyzed in some detail.

In 1988, the median for the Ninth was more than twice as long as that for each of the two fastest circuits, and less than a month kept the Ninth out of the cellar. It bears emphasis that, long as a year plus an additional two and a half months may seem to the litigants, this is only a median figure; half of the cases took longer.

In a 1985 work published by the Federal Judicial Center the Ninth Circuit was praised for the dramatic improvement from a 1980 high of 17.4 months (a median figure) from the filing of the record to disposition (a shorter period, usually by some months, than that from filing of the notice of appeal), but during the next four years the relevant figure rose by 20%.

There would be little point to multiplying statistics, nor would it be particularly useful elaborating on why the situation is indeed a source of concern. It is helpful, however, to speak of root causes.

The judges of the Ninth Circuit determined that to the extent practicable "each judge would sit an equal number of times with each other judge on the court, regardless of the judges' 'home bases,'" and that "each judge would sit an equal number of times in each of the three administrative units."[2] It is simply inconceivable that this does not drain a significant amount of time and energy from the judges. My point is not to criticize the court for its decision; if the most important consideration is avoiding division of the circuit, and if the undivided circuit is really to be a circuit, not one in name only, provision would have to be made for the judges to sit together and to hear cases together. But the price of doing this cannot be blinked and the net is a pattern of having judges sit together far too few times in the course of a cycle which requires the better part of two years to complete and yet traveling over a far-flung circuit at the cost we have mentioned. Creation of a Northwest Circuit would, at the very least, sharply reduce the number of trips required of those judges residing in Seattle and Portland. In addition, other travel would be reduced. This in itself would be a significant gain.

In this brief statement I shall not attempt to cover all the issues, nor rehearse all the reasons for creation of a new circuit. This case has been ably presented by the sponsors of the Bill. I thought to touch only one or two significant points that may warrant added emphasis.

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[2] I am indebted to Professor Church, writing in the volume already cited, for his analysis of the implications of the above decision.

INTRA-CIRCUIT UNIFORMITY

A critical question relates to the ability of the present circuit to maintain intra-circuit uniformity. The perception of the consumers can fairly be characterized as negative. Lawyers and district judges were asked if they agreed with the statement, "There is consistency between [Ninth Circuit] panels considering the same issues." Fifty-nine percent of the attorneys surveyed disagreed. Only 24% of the district court judges disagreed, but the identical percentage of district judges disagreed "strongly."

Of potentially greater significance, when asked whether they agreed with the statement "When intracircuit conflicts do arise, the Court of Appeals generally resolves them through modification of opinions or en banc rehearings," two-thirds of the district judges disagreed and "among lawyer members [of the circuit conference] the disagreement was even higher." These data are preeented by Professor Arthur Hellman, whom I quoted earlier.

I have taken the liberty of developing this point in some detail, not because I consider it the single most significant reason for creating a new circuit and reducing what has been termed the "gargantuan" Ninth to more workable proportions, but rather because Professor Hellman has published an analysis of consistency in the Ninth that is referred to a disproving the existence of a problem of circuit uniformity,[3] and it is tremendously important that the limits of that article, whatever its theoretical contributions, be clearly understood. Professor Hellman limited himself to published opinions. Published opinions count for only slightly over one-third of the cases adjudicated by the Ninth Circuit Court of Appeals. As Hellman notes, "In a single year, the court of appeals will adjudicate nearly 2,500 cases and will publish as many as 900 precedential opinions." When the Hellman study, then still in the planning stage, was discussed at a circuit conference there was strong feeling that a study of intra-circuit uniformity had to take account of the unpublished as well as the published decisions.

In its Tentative Recommendations, circulated for public comment, The Federal Courts Study Committee called for a period of serious study over the course of the next five years of an appropriate structure of the United States Courts of Appeals. Of course, if the study were to take place over tha next half decade, the results would have to be assessed, debated and referred to the Congress for such action as was deemed appropriate. I leave it to you to estimate how long it would take to implement whatever suggestions may emerge.

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[3] Hellman, Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court, 56 U. of Chi. L. Rev. 541 (1989).

There is much to be said for careful consideration of alternatives, but if the case for creation of a Twelfth Circuit seems as compelling to you as it does to me, it hardly appears desirable to postpone the benefits of a smaller, more manageable circuit--one five or six states in size--for the better part of a decade to see what may emerge. One additional circuit will hardly disturb the basic pattern of national structure or put in jeopardy adoption of whatever proposals may emerge from the next five or six years of "serious study."

Mr. Chairman, we move slowly in changing cherished institutions. We move particularly slowly when it comes to making changes in the federal judicial system. That is as it should be, because of the importance of that system to the well-being of the nation and to the quality of life of its citizenry. But caution must not be equated with a lack of capacity to act. Immobility does not serve the nation well when changed circumstances call for adjustments in present patterns.

The case for the creation of a new circuit having been made, I join in the recommendation that the Congress approve the Bill before you.

STATEMENT

OF

ERIC REDMAN

On Behalf of Heller, Ehrman, White & McAuliffe

In Opposition to S. 948

Before the

Subcommittee on Courts and Administrative Practice
Committee on the Judiciary
United States Senate

March 6, 1990

A. Introduction and Summary

My name is Eric Redman. I am a lawyer, a life-long resident of Washington State, and a partner in the Seattle office of Heller, Ehrman, White & McAuliffe. I appreciate the opportunity to testify today on behalf of myself and my firm in opposition to S. 948, a bill to divide the U.S. Court of Appeals for the Ninth Circuit into two circuit courts, one for the Northwest and one for California and the Southwest.

Heller, Ehrman is a West Coast law firm with more than 300 lawyers and with offices in all four of the West Coast states. Our California offices are in San Francisco, Palo Alto, and Los Angeles. Our Northwest offices are in Seattle, Tacoma, Portland, and Anchorage. As a firm, we celebrate our 100th anniversary this year, but our Northwest offices, with a total of 80 lawyers, are less than a decade old. This pattern of growth can be seen in other law firms and other sectors of the economy. It reflects a reality that S. 948 resists: the Northwest and California are becoming more integrated over time, not less.

Our firm is one of the most active before the Ninth Circuit, as well as before other federal courts. I have briefed and argued, or supervised, some two dozen cases in the Ninth Circuit and other U.S. Courts of Appeal, both at Heller, Ehrman since 1982 and earlier as a partner in the Seattle office of Preston, Thorgrimson, another multi-state law firm. Many of my partners at Heller, Ehrman have briefed and argued far more Ninth Circuit cases than I. My testimony today reflects my own views and experience, but

Heller, Ehrman as a firm also opposes S. 948, and I have been authorized to so state.

I have read the materials in support of S. 948, and find them unpersuasive. The optimum size of any court is certainly a subject on which reasonable minds can differ. But as a lawyer familiar with the Ninth Circuit, I am confident that splitting the Circuit would not solve any problem the bill's sponsors cite. Moreover, as a Westerner and a Northwesterner, I believe splitting the Circuit would harm, not help, the regional interests the bill's Northwest sponsors invoke. My testimony is intended to demonstrate these points.

B. A Practitioner's Viewpoint

I have criticized the Ninth Circuit in the past and expect to do so in the future. I have heard other lawyers criticize the Ninth Circuit, too. This should surprise no one. Lawyers tend to criticize a court in which they lose a case, and someone loses every case the Ninth Circuit decides. But in years of hearing the Ninth Circuit criticized (and praised), I have never heard any lawyer suggest that splitting the Circuit would improve it.

Since this hearing was announced, I've made a point of asking other lawyers who practice in the federal courts whether any of them has ever heard another lawyer suggest that the Ninth Circuit should be split. I am sure such lawyers exist, but none that I have asked remembers having made the suggestion or hearing another lawyer make it. My informal survey provides only anecdotal evidence, but it helps dramatize an important starting point in analyzing S. 948: splitting the Ninth Circuit is not something that the lawyers who practice before the Ninth Circuit have requested.

If asked, many lawyers would be pleased to offer suggestions for improving the Ninth Circuit. Few would put splitting the Court high on their list. In fact, not only the judges of the Circuit (including a vast majority of the district court and bankruptcy judges), but the lawyers of the Circuit have repeatedly and overwhelmingly voted against splitting the Circuit. Most recently the vote was against S. 948 itself. This vote is described in Attachment A to my testimony, which my Los Angeles partner Ray Fisher prepared.[1]

One Alaska lawyer I asked said he'd never suggested splitting the Circuit, but thought it might be worthwhile if it resulted in more Alaskans being appointed to the Court of Appeals. This illustrates an important second point: splitting the Circuit would not solve what most people consider the shortcomings of the Court, because those shortcomings do not stem from the Court's size. For example, splitting the Circuit would not create more judges from Alaska. Conversely, Congress can create more Alaska judges without splitting the Circuit.

S. 948's sponsors cite many problems (real or imagined) that result from the Ninth Circuit's caseload, not the size of the Court itself. The sponsors allege that decisions take too long, are too numerous, and depend too much on staff attorneys and law clerks. Even if true, these and other allegations at most indicate that the Court is overburdened--i.e., that there is too much work per judge. Spreading the same total caseload among the same number of judges in two courts rather than one (which is all that S. 948 would do) would not reduce the workload of any judge. To deal with that problem, Congress must either create more judgeships or help find ways for our growing society to become less litigious.

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[1] As shown in Attachment A, the lawyer representatives to the Ninth Circuit Judicial Conference opposed S. 948 in 1989 by a vote of 69 to 10, with 3 abstentions.

S. 948's sponsors also decry conflicts among decisions of the Circuit. The available research on conflicts within the Ninth Circuit indicates that this concern is exaggerated, and has little to do with the Court's size. When such conflicts arise, they can be resolved by the en banc process. (The bill's sponsors contend such conflicts can escape detection by bench and bar; if so, they aren't very important conflicts, almost by definition.) The en banc process within the Ninth Circuit should be easier, more predictable, and far less expensive than seeking Supreme Court review of conflicts between the new Ninth and Twelfth Circuits--the alternative available if S. 948 were enacted.

That the en banc panel consists of less than the full Court has no practical significance to lawyers or litigants in the Ninth Circuit. First, limited en banc panels will become increasingly widespread as the nation grows and the size of the Circuit Courts increases--unless Congress fragments all the Circuits into many new courts in the years ahead. More important, and contrary to the apparent fears of S. 948's sponsors, lawyers can and do rely on an *en banc* decision of the Ninth Circuit as safely as on the *en banc* decisions of other Circuits (and more safely, perhaps, than on a 5-4 decision of the Supreme Court).

No decision of any court--*en banc* or not--is carved in stone. Different judges, or a court with different composition, will face the same issue again, perhaps when the times--not just the identities of the judges--have changed substantially. On the other hand, judges do respect precedent, and no *en banc* decision can be lightly disregarded by a later panel. I would be very surprised if any judge considered an *en banc* decision any less binding simply because the *en banc* panel consisted of less than the full court.

In short, as a lawyer who practices before the Ninth Circuit I see no virtue in enacting S. 948 and splitting the Circuit. The bill appears to represent a solution in search of a problem. The problems the bill's sponsors cite are (1) not the problems Ninth Circuit practitioners really encounter, or (2) not problems resulting from the Court's size (as distinct from its workload), or (3) generic problems of the Courts of Appeal. Congress cannot solve the generic problems of the Courts of Appeal by splitting and re-splitting each as it grows.

C. A Northwesterner's Viewpoint

The impetus to split the Ninth Circuit seems to have less to do with problems in the Court than with problems in the Northwest, particularly problems that Northwesterners attribute to the Court's decisions or to the dominance of California generally. A strong theme in the statements of S. 948's sponsors is that the time has come for the Northwest to have its own federal Court of Appeals.

I believe that I am as ardent a Northwesterner as anyone. Having apprenticed for years as an aide to Senator Warren G. Magnuson, I am also well-trained to argue that the public good is generally best served whenever a new or enlarged federal presence can be secured for Washington State, the prospective headquarters of the new Twelfth Circuit that S. 948 would create. But it simply does not follow that splitting a federal court on Northwest-Southwest lines would benefit the Northwest.

First, the Court of Appeals is a federal court. Its primary duty is to interpret and apply federal law, including federal statutes that Congress writes. Would it really benefit the Northwest--and if so, for how long--to encourage peculiarly "Northwest" interpretations of federal statutes that apply throughout the land? Although state laws can and do vary, there is no room in our judicial system for "regional" federal law and no way, in the end, to sustain such a creature.

Second, even if "Northwest" interpretations of federal law were desirable and durable, splitting the Circuit would not necessarily produce such interpretations. Any lawyer active before the Ninth Circuit would admit that judicial home towns, as distinct from political ideology or judicial philosophy, play no discernible role in the Court's decisions. (The D.C. Circuit illustrates the same point; appointments to the D.C. Circuit are sometimes contentious precisely because the philosophies of individual judges matter more than the fact that all the judges sit in, and presumably reside in or near, a single city.) We do have Northwest judges who would be second to none, for example, in their desire to protect old growth timber and the Northern spotted owl.

Third, a Circuit spanning the Northwest and Southwest can legitimize the resolution of Northwest-Southwest conflicts, thus giving the Northwest some protection from political retaliation when the Northwest wins. The obvious example arises under Section 7(k) of the Northwest Power Act. That section governs rates charged by the Bonneville Power Administration ("BPA") for nonfirm energy sold to California utilities--a matter in which hundreds of millions of dollars are at stake. The Northwest Power Act provides for direct appellate review of BPA's actions by the Ninth Circuit. Despite the predominance of California judges on the Ninth Circuit, and despite the extremely hard-hitting and sustained series of challenges to BPA's rates brought by the California utilities and regulatory agencies, the Ninth Circuit has consistently ruled against the California parties and in favor of the Northwest parties in all major Northwest Power Act litigation.

I believe the Northwest's victories in the Northwest Power Act cases have resulted solely from the Northwest parties having had the better of the legal and factual arguments. But whatever the explanation, the Northwest victories are certainly inconsistent with the existence of pro-California bias on the Court. And I doubt the proposed Twelfth Circuit could have handed the Californians as many losses, on an issue with so much money at stake, without exposing those Northwest victories to danger right here in the halls of Congress.

Many of S. 948's sponsors also sponsored the Northwest Power Act a decade ago. None of the Power Act's sponsors expressed qualms at the time about entrusting resolution of the Northwest-Southwest electric power battles to the Ninth Circuit. Nothing in the Court's performance suggests any such qualms would have been warranted. In practice, the numerical predominance of Californians on the primary court that interprets federal statutes affecting the Northwest has so far been no more adverse to the Northwest than the numerical predominance of Californians here in Congress, where those federal statutes are written.

Fourth, S. 948 ignores that the West and the West Coast have become real regions in themselves, and that the Northwest benefits from being part of, not separate from, the rest of the West and the West Coast. At this stage in our nation's history, there is nothing artificial about joining the Northwest and Southwest in a single federal court system, and something harmful as well as artificial about splitting them apart.

The contrast between the East and West Coasts is instructive. S. 948's sponsors argue that the existence of five Circuits on the East Coast proves the viability of two Circuits on the West Coast. Is it not more logical, however, to recognize that history has provided the West Coast an opportunity to be a region in a sense the East Coast is not? The states of the Eastern seaboard are numerous and small in size by Western standards; they became grouped in several functional regions--and gave birth to the concept of "conflict among the Circuits"--at a time when there was really no choice: long-distance transportation and communications were slow and difficult.

The West Coast, including Alaska, is twice as long and consists of only four states. It is a large, later-developing, historically- and commercially-interconnected region now easily spanned by modern transportation and communications. Why should anyone want to Balkanize this region unnecessarily? Firms, companies, and individuals increasingly do business up and down the Coast--very much to their convenience and benefit.

(An example: My father practiced law in Seattle for many years, and probably never imagined a day when Seattle lawyers would have Anchorage and Los Angeles partners. By contrast, I learned of this hearing while visiting my firm's Anchorage office. I immediately called my partner Ray Fisher, who serves as Chair of the Lawyer Representative Coordinating Committee of the Ninth Circuit Judicial Conference and who prepared the materials in Attachment A to my testimony, which I completed on another trip to Anchorage. Mr. Fisher works in our Los Angeles office, nearly 3000 miles from Anchorage. Times change, in this case in the direction of greater regional integration, not less.)

Finally, the entire West Coast is part of the Pacific Rim. We face, across the ocean, increasingly important sources of investment in our nation and our region. I believe the Northwest benefits economically, and will benefit even more in the years ahead, from any measures that help persuade foreign investors it is as easy to invest in the Northwest as in California, Hawaii, or other Southwest locations--the places where investment by Japanese, Korean, Hong Kong, and other Pacific interests has until now been concentrated. In this regard, it is a potentially enormous boon for the Northwest to share with California a U.S. Court of Appeals and a common body of federal decisional law. This will give comfort to foreigners considering investments in the Northwest, and it is something we should be very reluctant to give up.

Precisely because of such changes in the West and Northwest and on the Pacific Rim, I differ slightly from Chief Judge Alfred T. Goodwin of the Ninth Circuit in trying to summarize what's wrong with S. 948. Judge Goodwin says that splitting the Circuit is an idea whose time has not yet come. I believe it is an idea whose time has already passed. The Northwest is no longer the equivalent of an island. We should not wish it to become one.

ATTACHMENT A

HELLER, EHRMAN, WHITE & McAULIFFE
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February 27, 1990

RECEIVED
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HELLER EHRMAN

BY FEDERAL EXPRESS

Senator Howell Heflin
Chairman, Subcommittee on
Courts and Administrative Practice
Senate Judicial Committee
223 Hart Senate Office Building
Washington, D.C. 20510

Re: S.948

Dear Senator Heflin:

I understand your subcommittee is planning to receive testimony rejecting S.948, next week. As Chairman of the Lawyer Representative Coordinating Committee of the Ninth Circuit Judicial Conference, I would like to inform you of a recent vote of the lawyer representatives in opposition to this legislation, which would split the Ninth Circuit.

First let me explain who the lawyer representatives are. Each of the 15 districts throughout the Circuit elects one lawyer per active district judge to serve, in accordance with 28 U.S.C. §333, as representatives to the annual Circuit Judicial Conference and to work throughout the year with the federal courts in addressing problems of judicial administration. Typically these lawyer representatives are experienced federal practitioners who reflect a cross-section of the federal bar in each district. They come from private law firms, both large and small, including solo practices; from civil and criminal practices; and from the private and public sector. As such, they are--as Congress intended they should be--a representative voice for those who deal daily with the federal courts throughout the Circuit.

February 27, 1990
Page 2

Each district annually elects a chair of the district's lawyer representatives, who in turn serves as a member of the circuit-wide Lawyer Representative Coordinating Committee (LRCC). The LRCC, as its name implies, both coordinates activities and fosters communication across districts.

Last year, both the LRCC and the lawyer representatives attending the Ninth Circuit Judicial Conference specifically debated and voted on the question of splitting the Circuit, as proposed by S.948. As you can see from the attached copy of Resolution No. 9 and the tally of votes (by both judges and lawyer representatives), the **opposition** to splitting the Circuit was **overwhelming**, with the lawyers voting 69 to 10 against S.948.

Given the nature and purpose of the lawyer representative role in the Judicial Conference, I believe the strong opposition of this group to S.948 as recently as last July is persuasive evidence of the feelings of the vast majority of federal practitioners throughout the Circuit regarding the merits of S.948.

If I can provide any further information, I shall be pleased to do so.

Very truly yours,

Raymond C. Fisher
Chairman, LRCC

cc: Honorable Alfred T. Goodwin
Members of LRCC
Ninth Circuit Judicial Conference
Executive Committee
Alan I. Rothenberg, Esq.
Eric Redman, Esq.

Resolution No. 9

Opposition to Dividing the Circuit

Submitted by

Chief Judge Alfred T. Goodwin

WHEREAS, a bill is now pending in the United States Congress (S.948) to divide the Ninth Circuit, placing Alaska, Hawaii, Idaho, Montana, Oregon and Washington in a new circuit, and;

WHEREAS, members of this conference in 1982 and 1984 overwhelmingly recommended rejection of any proposal to divide the Ninth Circuit on the ground that the Ninth Circuit was functioning effectively and division would not alleviate the problems caused by burgeoning caseloads which confronted the entire federal judicial system, and;

WHEREAS, the considerations which counseled opposition to division of the Ninth Circuit in 1982 and 1984 remain true today;

NOW, THEREFORE, BE IT RESOLVED that the Ninth Circuit Judicial Conference again recommends to the United States Congress that it reject any proposal to divide the Ninth Circuit at this time.

Statement of Reasons

See S.948, Ninth Circuit Court of Appeals Reorganization Act memorandum.

TALLY, from page 3

Resolution No. 4 asks the circuit to adopt standards for evaluating the complexity of Criminal Justice Act appeals to be used as guidelines in determining waivers of maximum rates of compensation, and to permit advance approval for waivers by appointed counsel.

The vote:	PASSED				
Judges:	104	Yes	Attorneys:	72	Yes
	26	No		6	No
	8	Abstain		3	Abstain

Resolution No. 5 requests that judicial officers be paid bi-weekly instead of monthly.

The vote:	PASSED				
Judges:	78	Yes	Attorneys:	71	Yes
	58	No		7	No
	2	Abstain		3	Abstain

Resolution No. 6 urges the U.S. Judicial Conference to submit a resolution to Congress asking it to reconsider mandatory minimum sentencing statutes and to establish alternate policy that retains some flexibility in the criminal sentencing process.

The vote:	PASSED				
Judges:	117	Yes	Attorneys:	70	Yes
	18	No		10	No
	3	Abstain		1	Abstain

Resolution No. 7 asks the U.S. Judicial Conference to support legislation to require biennial circuit conferences. The vote: Resolution was TABLED by the conference for consideration by the Wiggins Committee on the Size, Structure, and Composition of the Conference.

Resolution No. 8 directs the Administrative Office of the U.S. Courts to reimburse lawyer representatives for the expense of their attending the judicial conference.

The vote:	DEFEATED				
Judges:	63	Yes	Attorneys:	52	Yes
	65	No		27	No
	5	Abstain		3	Abstain

Resolution No. 9 asks the judicial conference to recommend to the Congress that it reject any proposal to divide the Ninth Circuit.

The vote:	PASSED				
Judges:	114	Yes	Attorneys:	69	Yes
	18	No		10	No
	1	Abstain		3	Abstain

■

TESTIMONY OF

EUGENE A. WRIGHT
UNITED STATES CIRCUIT JUDGE

BEFORE THE
SENATE JUDICIARY
SUBCOMMITTEE ON COURTS & ADMINISTRATIVE PRACTICE

THE HONORABLE HOWELL HEFLIN, CHAIRMAN

HEARING ON S. 948
NINTH CIRCUIT COURT OF APPEALS REORGANIZATION ACT

TUESDAY, MARCH 6, 1990

(TESTIMONY ON S1156, 1984 RESUBMITTED)

STATEMENT OF EUGENE A. WRIGHT,
UNITED STATES CIRCUIT JUDGE

RE: S1156, 98th Congress, 1st Session 1524

This is a response to the invitation of the Chairman, Subcommittee on Courts, Senate Committee on the Judiciary. I am Circuit Judge Eugene A. Wright of Seattle, a judge of the United States Court of Appeals for the Ninth Circuit since 1969. I served previously as a judge of the Superior Court, state of Washington, from 1954 to 1966.

My deep interest in judicial administration has continued for more than 30 years. I was a member of a committee appointed by Justice Tom C. Clark to establish the National Judicial College and was a member of the college faculty for its first eight years. Improvement of the administration of justice has been a big part of my life.

The following are essential if a federal appeals court is to be efficient, capable of giving public service of high quality and relatively current in its work:

1. A manageable court of no more than nine active judges.
2. Judges drawn from geographical areas with common legal problems.
3. A jurisdiction that is relatively compact with its major cities connected by regular, direct commercial air travel.
4. Close, personal relationships and collegiality among the judges.

5. A manageable court load.

6. A court policy that requires consistency in its determinations.

7. A commitment to deliver the best quality of justice at the least cost in the shortest time.

8. The ability to communicate with its judges easily and regularly by conference call telephone.

9. A policy that contemplates that opinions for publication will be circulated to all judges of the court in advance of filing.

10. A court headquarters in a central, readily accessible location.

11. An adequate supporting staff, central library and satellite libraries.

12. Modern, efficient word processing equipment for fast composition and transmission of intracourt memoranda and judicial opinions.

13. Judges with knowledge of state court systems within the circuit, acquaintance with the state judiciary, bar leaders and the accredited law schools within the circuit.

In 1973 I testified before the Commission on Revision of the Federal Court Appellate System. Among others appearing at the hearings in Seattle were Senator Henry M. Jackson, three state bar presidents, two law teachers, a United States attorney, an author of works on the history and future of Alaska, and some distinguished practitioners with wide federal court experience.

Each speaker spoke in favor of the creation of a separate circuit for the five northwestern states. Following its deliberations, the Commission concluded:

> 4. A separate circuit for the five northwestern states is not now warranted.
>
> The appeals filed from the five northwestern states (Alaska, Washington, Oregon, Idaho and Montana) in Fiscal Year 1973 accounted for only 17 per cent of the workload of the circuit and totalled slightly less than the filings in the three-judge First Circuit, regarded as something of an anomaly within the overloaded federal appellate system. To create another small circuit would be undesirable. The Commission has heard testimony that the rapidly growing population and expanding business in the northwest will soon result in substantially increased litigation at the appellate as well as the trial level. Should these projections be borne out, a separate circuit for the four or five northwestern states may become appropriate. (emphasis added)

The separate circuit has become appropriate. The enactment of S1216 is overdue.

The Commission, of which Senator Roman L. Hruska was chairman, made these observations:

> A related problem is the obligation felt by many judges to keep current with all decisions handed down by each of the panels

in their court. The effort to avoid intracircuit conflicts, rather than merely to resolve them, and to remain familiar with the evolving law of the circuit, is commendable. Yet, as the court increases in size, the obligation to remain current would eventually impose burdens of impossible magnitude. Even under more favorable conditions many circuits no longer undertake to have each active judge review decisions before they are handed down, and in larger circuits there is already evidence that all of the judges may no longer be able to remain current with the law of the circuit as it develops.

In sum, an increase in the size of the court guarantees an increase in its problems, and under present procedures greatly increases the burden of complying with the letter and the spirit of the provisions of the Federal Rules of Appellate Procedure governing en banc hearings. The number of possible panels rises as the circuit grows; the opportunity for intracircuit conflict increases; and the cost in judge power to resolve each of the conflicts

> *which develops parallels the other two*. Any acceptable solution to the problem of managing a large circuit must provide some satisfactory resolution of these problems. (emphasis supplied)

These observations were prophetic. All of the judges of the Ninth Circuit are now no longer able to remain current with the law of the circuit as it develops. On Saturday, March 10, 1984, I received at my office 61 Ninth Circuit dispositions, representing an accumulation for just one week. They had been produced by 22 active judges, nine senior judges, and visiting circuit and district judges. They covered at least 23 subjects, virtually everything from agriculture to tort claims.

By Sunday night, I had scanned all 61 of these opinions. I read many thoroughly for their possible bearing on my own work in progress.

Many judges of this court and of the district courts of this circuit tell us they are unable to read this volume of material. Appeals come to this court from 16 judicial districts manned by 70 active district judges and 32 senior judges plus visiting judges, and from countless administrative agencies from which direct appeals are taken.

Because of the volume of this printed material, judges are obliged to rely upon law clerks, staff attorneys, librarians and the eternal hope that their next opinions do not stray too far from the current law of the circuit.

In addition to that volume of circuit opinions, my office receives from other judges their draft opinions, comments on my drafts, petitions for rehearing, suggestions for en banc consideration, and miscellaneous intracourt memoranda commenting on the opinions of one another and suggesting major changes in filed opinions, and urging that the publication in bound volumes be stopped until all 23 active judges can reconsider.

At the hearings in 1973 before the Hruska Commission, Stan Pitkin, the United States Attorney for the Western District of Washington, testified:

> Not only does the sheer size of the Ninth Circuit affect personal relationships within the court, it affects the relationships between the members of the court on the one hand, and the district judges and the bar of the circuit on the other. Judges whose background and experience lie in places a thousand miles from a given court, are unlikely to have a full appreciation of regional aspects of an issue, even if they are aware of them. (emphasis supplied)

Since that statement, the court has increased in size from 13 to 23 active judges. They are moved thousands of miles each month, from Alaska to Pasadena, San Diego to Seattle, Tucson to Anchorage, and back again. The cost in public funds for this excessive travel is inexcusable.

But private funds are spent, too, because the authorized per diem does not cover the cost and judges must pay the difference. Much of the travel is done by commercial air at fares more than double those of ten years ago. As every public servant is aware, the costs of hotels and meals have more than quadrupled.

The financial cost is bad enough. I am more concerned about the cost in judicial time and the effect on the physical and mental health of judges.

Judicial time is a precious and limited commodity. When it is wasted, it cannot be made up. Not enough time means poorer preparation for decision making, abbreviated dispositions, and delayed decisions. This court's latest report of February 29, 1984 shows a total of 394 cases under submission awaiting decision. Of those, 19 have been pending more than 12 months since oral argument or submission.

Judicial time which should be given to decision making is squandered. It is wasted in flying around the circuit in cabs, buses, airplanes and rented cars and working in temporary offices without the word processing equipment, secretaries and law clerks that judges need. A judge away from his or her home office is inefficient and less productive.

I am concerned about the comfort and health of judges. We have insufficient time for rest, exercise and reflection. Some judges are in their offices on Saturdays. Others read briefs and slip opinions at home when they should be gardening, golfing, sailing or resting. Their spouses are truly concerned.

In the book "Justice on Appeal," by Professors Carrington, Meador and Rosenberg (West Publishing Company, 1976), the authors wrote:

> These judicial duties require the maintenance of a network of personal relationships and attendance at a

> variety of meetings, as well as many individual encounters. Moreover, it is essential to the very nature of the deliberate act of judging that the job not be performed at a frenetic pace. Time for reflection and study is essential. So is mental and physical health. It is undeniably in the public interest that the judge not be compelled to devote every waking minute to his judicial duties. He should be expected to maintain healthy, non-legal interests, and to participate in non-legal affairs to a reasonable degree. It will be devastating to the longer-term welfare of the legal system to accept as a permanent condition of judicial life a substantial burden of evening and weekend work, or to extend the normal judicial working year beyond about 230 work days. (emphasis supplied)

The Judicial Conference of the United States took the position in 1964 that a single court should not exceed nine judges. The authors of "Justice on Appeal" thought that too high. They wrote:

> The breaking point may well be the point at which the sitting panel becomes a minority of the full court. And we are fairly confident that the benefit has been lost when the sitting panel is no longer even a substantial minority of the larger group, e.g., three of seven. Thus, we are prone to recommend against the en banc procedure in groups larger than seven if regular sittings are in panels of three.

The authors had this to say about costs:

> Some have expressed concern about the cost of operating a circuit as large as the 9th. By geographical dispersion, we find that distance is a troublesome factor in arranging the logistics of oral arguments and judges' conferences, and in assigning judges to panels. The travel of judges and counsel involves costs that must be borne by the public and clients. But the costs are even more significant in the time loss they entail than in fares alone. (emphasis supplied)

The Hruska Commission in 1973 noted that the Pacific Northwest states accounted for only 17 percent of the Ninth Circuit appeals or 373 cases compared to 1,885. But the predictions of witnesses have been borne out.

By 1982 the five northwest states accounted for 1,201 cases or 27.7 percent of the total Ninth Circuit filings compared with 3,131 cases for the rest of the circuit. Estimated filings for the Pacific Northwest for 1984 are 1,359 cases. The growth of litigation in the Pacific Northwest has been 596 percent between 1969 and 1984. The rest of the circuit grew only at 475 percent.

In 1974 the Washington State Bar, an integrated association, numbered 4,900 lawyers. In 1984 it is almost 12,000 lawyers. In February 1982 the Board of Governors of the Association formally supported the concept of the creation of a Pacific Northwest Circuit. A motion to reconsider failed and the position of the Board of Governors continues to be that of supporting the creation of a new circuit.

Since statehood in Alaska, the growth in that part of the country has been truly phenomenal. Consider these figures:

1970 Alaska population: 302,583
1982 Alaska population: 460,837
1972 Alaska bar association membership: 800 lawyers
1984 Alaska bar association membership: 2,038 lawyers

District court filings in Alaska went from 478 in 1971 to 796 in 1981.

In a 1982 lecture at the University of Southern California Law Center, Circuit Judge Richard A. Posner said:

> It is widely believed, and the experience of the Ninth Circuit with its 23-active circuit judges offers no contrary evidence, that the largest number of judges that is consistent with an appellate court's maintaining reasonable cohesion is nine. . . . The reason is that nine seems to be the largest number of judges that can deliberate in judicial fashion on a case; with a larger number the deliberation begins to resemble that of a legislative body. (emphasis supplied)

56 S. Cal. L.R. 761, 762 (March 1983).

Professor Daniel J. Meador, one of the authors of "Justice on Appeal," wrote in 1981:

> The federal judicial system has now reached the stage where the number of appellate decisional units risks serious unevenness and uncertainty within each circuit and between the circuits.
>
> . . .
>
> As the likelihood of differing interpretations and applications of federal law has increased, the efficacy of an en banc procedure to iron-out internal circuit variations has greatly diminished. When an appellate court exceeds nine judges, it is widely believed that the en banc procedure is more cumbersome, less likely to be employed, and less productive of a coherent, collegial decision. Whatever might be the optimum number for an en banc body, it is clear that a single court of twenty-three or twenty-six judges makes a mockery of a judicial proceeding.

> In a court of nine judges, there are eighty-four possible combinations of three; in a court of twenty-three judges, there are 1,771 possible groups of three. (emphasis supplied)

1981 Brigham Young Univ. L.R. 639, 643, 644.

A Pacific Northwest Circuit will better serve the public and the bar. These will be the immediate advantages:

(1) Northwest cases will be filed in Seattle, not San Francisco.

(2) Cases will be calendared earlier, not delayed by those from the southern portion of the present circuit.

(3) Decisions will be rendered promptly, by judges who recognize the factor of time with reference to cases under submission.

(4) The law will be clarified and district judges and lawyers will be able to find and rely on it.

(5) Cases will be decided by judges familiar with the region who understand its geography, economy, commerce, environment, Indian and Alaska Native problems, and the legal problems peculiar to the Pacific Northwest states. These judges will know the local state and federal judiciary, the bar, and the economics of law practice. Strong state-federal relationships will be developed.

(6) The new circuit would identify quickly the special requirements of the district and bankruptcy courts of the region and support their requests for additional judgeships and the need for borrowed judges to meet special situations.

(7) A new circuit of no more than nine judges, all living within five states with common interests, can assume leadership in the improvement of appellate advocacy, providing guidance to regional law schools and the organized bar, and can take corrective measures when appropriate.

(8) A circuit of no more than nine judges will have no disparity of opinions by different panels. Following the practice in the Third Circuit, all opinions by a three-judge panel will be circulated to all members of the court before filing, allowing a few days for comment, disagreement, and suggestion before cases become the law of the circuit. There would be far fewer en banc cases, the law would be stabilized, and an end to intracourt critical memoranda following the filing of opinions.